No. 17-1498

# In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, PETITIONER

*v.*

GREGORY A. CHRISTIAN, ET AL.

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER**


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## QUESTIONS PRESENTED

Respondents own property within a site that has been designated for cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (42 U.S.C. 9601 *et seq.*). Respondents filed state-law tort claims against petitioner in a Montana court, seeking "restoration damages" to fund proposed cleanup activities that are not part of the Environmental Protection Agency (EPA)'s CERCLA remedial action. The questions presented are as follows:

1. Whether the state courts had jurisdiction to hear respondents' claims for restoration damages.

2. Whether CERCLA preempts respondents' claims for restoration damages.

3. Whether respondents are "potentially responsible part[ies]" who are prohibited by Section 122(e)(6) of CERCLA, 42 U.S.C. 9622(e)(6), from undertaking remedial action without EPA authorization.

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## INTEREST OF THE UNITED STATES

This case involves an environmental cleanup at a Superfund site administered by the Environmental Protection Agency (EPA) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. Respondents, who own land within the site, brought Montana-law claims in state court. Among other elements of relief, respondents sought funds to conduct cleanup activities that were not part of the remedy EPA had selected under CERCLA, and that would require undoing parts of that remedy. The Court's decision whether to permit such claims to proceed will have a significant effect on the cleanup at this Superfund site and others throughout the country. The United States accordingly has a substantial interest in

the resolution of the questions presented. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-35a.

## STATEMENT

After completing the extensive process prescribed by CERCLA, EPA selected multiple remedies to clean up contamination at the Anaconda Smelter Superfund site near Butte, Montana (the Site). Pet. App. 4a. At EPA's direction, petitioner has performed—and continues to perform—extensive remediation work at the Site. *Ibid.* Respondents, who own land within the Site, brought an action in Montana state court seeking "restoration damages" to fund remedial actions that EPA had not selected as part of its cleanup plan. *Id.* at 5a. Petitioner sought dismissal of the claims for restoration damages. *Ibid.* The state trial court allowed the claims to proceed. *Id.* at 41a-55a. After granting a writ of supervisory control before trial, the Montana Supreme Court affirmed. *Id.* at 1a-40a.

### A. CERCLA

In 1980, Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 602 (2009). Members of Congress expressed particular concern about the dearth of federal authority to clean up toxic contamination at sites like the Love Canal in New York, where

dumped chemicals had spread into residential neighborhoods. See S. Rep. No. 848, 96th Cong., 2d Sess. 8-10 (1980). CERCLA addressed that problem by granting the President (and, as relevant here, EPA as his delegate) "broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994).

CERCLA directs EPA to compile and revise annually a prioritized list of contaminated sites for cleanup, commonly known as Superfund sites. 42 U.S.C. 9605. CERCLA establishes a detailed process for investigating, selecting, and implementing a cleanup plan (or "response" action) to protect human health and the environment at each site. 42 U.S.C. 9601(25); see 42 U.S.C. 9604, 9606, 9621. Among other steps, CERCLA prescribes extensive public consultation, including an opportunity for public notice-and-comment on a cleanup plan, 42 U.S.C. 9613(k), 9617; "substantial and meaningful involvement by each State in initiation, development and selection of" cleanup actions in that State, 42 U.S.C. 9621(f)(1); and a remedy that complies with more stringent "applicable or relevant and appropriate" requirements of state environmental law (unless those requirements are waived), 42 U.S.C. 9621(d)(4), (f)(2)(A). CERCLA also provides for review of a selected cleanup plan at least once every five years at sites where contamination remains in place. 42 U.S.C. 9621(c).

Section 113 of CERCLA, titled "Civil proceedings," governs CERCLA-related litigation. 42 U.S.C. 9613. Of particular relevance here, Section 113(b) states that, "[e]xcept as provided in subsections (a) and (h) of this section, the United States district courts shall have ex-

clusive original jurisdiction over all controversies arising under [CERCLA], without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. 9613(b). Section 113(a) requires any "application" for "[r]eview of any regulation promulgated under" CERCLA to be made in the D.C. Circuit "within ninety days" after the regulation is promulgated. 42 U.S.C. 9613(a). Section 113(h), titled "Timing of review," provides:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [as authorized by five enumerated CERCLA provisions].

42 U.S.C. 9613(h).

Even in the enumerated categories of lawsuits that Section 113(h) allows, Section 113(j) imposes substantial restrictions on the scope of judicial review. Section 113(j) limits "judicial review of any issues concerning the adequacy of any response action taken or ordered by" EPA "to the administrative record"; requires a court to "uphold" EPA's decision unless it "was arbitrary and capricious or otherwise not in accordance with law"; and limits court-imposed remedies to those consistent with the National Contingency Plan—a set of regulations that informs the federal government's response to releases of hazardous substances. 42 U.S.C. 9613(j)(1)-(3); see 42 U.S.C. 9605.

Section 122(e)(6) of CERCLA, titled "Inconsistent response action," contains another significant limitation. 42 U.S.C. 9622(e)(6). Under that provision, "[w]hen either [EPA], or a potentially responsible party * * * has initiated a remedial investigation and feasibility study for a particular facility * * * , no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by" EPA. *Ibid.*

CERCLA includes several savings clauses. First, "[n]othing in [CERCLA] 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." 42 U.S.C. 9614(a). Second, "[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. 9652(d). Finally, 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 113(h). 42 U.S.C. 9659(h).

**B. The Anaconda Smelter Superfund Site**

The Anaconda Company "opened its first copper smelter in 1884, twenty-six miles west of the mining town of Butte." 358 P.3d 131, 137. For nearly a century, copper smelting generated prosperity and needed materials, but it also created hazardous byproducts. *Ibid.* In 1977, petitioner purchased the Anaconda Company. *Id.* at 138. The smelter "ceased operations" three years later. *Ibid.* In 1983, EPA designated an area of more than 300 square miles around the Anaconda smelter as

one of the inaugural Superfund sites. *Ibid.*; see 48 Fed. Reg. 40,658 (Sept. 8, 1983).

Over the past 35 years, EPA has managed an extensive cleanup at the Site. In 1984, EPA "issued an administrative order requiring [petitioner] to begin a remedial investigation" at the Site. Pet. App. 4a. EPA, along with the Montana Department of Environmental Quality (MDEQ), then engaged in the detailed process of study and consultation that CERCLA provides for selecting a remedy. See 42 U.S.C. 9613(k)(2), 9617, 9621; 40 C.F.R. 300.435. Among other measures, EPA published its proposed remedial plans for public comment, provided notice of its plans in local newspapers, presented scientific reports for public inspection, convened community meetings, and held formal public hearings. See EPA and MDEQ, *Record of Decision: Community Soils Operable Unit, Anaconda Smelter NPL Site, Anaconda, Montana* § 3 (Sept. 25, 1996) (Soils ROD), https://go.usa.gov/xVxqk; EPA and MDEQ, *Record of Decision: Anaconda Regional Water, Waste, and Soils Operable Unit, Anaconda Smelter NPL Site, Anaconda, Montana* § 3 (Sept. 1998) (Water ROD), https://go.usa.gov/xVx3N.

EPA ultimately selected multiple remedies, two of which are relevant here. First, in 1996, EPA selected a remedy to clean residential yards contaminated with arsenic. J.A. 93. The plan called for cleaning up any residential yards whose soil arsenic concentrations exceeded 250 parts per million (ppm) by removing the existing soil to a maximum depth of 18 inches, replacing it with clean soil, and capping the soil with a protective barrier. J.A. 94-95. EPA has since revised the plan to require soil removal in residential yards to a depth of 12 inches. EPA, *Explanation of Significant Differences:*

*Community Soils Operable Unit Anaconda Smelter NPL Site* § 4.2 (May 2017), https://go.usa.gov/xVbZD.

Second, in 1998, EPA selected a remedy to address, among other problems, groundwater and surface-water contamination. Water ROD §§ 9.5, 9.6. That plan required remediation where arsenic levels in the water exceeded 18 parts per billion (ppb). *Ibid.* In 2011, EPA amended the plan to require remediation where arsenic water levels exceeded 10 ppb. EPA and MDEQ, *Record of Decision Amendment: Anaconda Regional Water, Waste, and Soils Operable Unit, Anaconda Smelter NPL Site, Anaconda-Deer Lodge County, Montana* Pt. II, § 3 (Sept. 2011), https://go.usa.gov/xVxr7. EPA also considered requiring the construction of underground barriers for collecting and treating groundwater in particular areas of the Site, but determined that such structures would not be effective. See *id.* Pt. II, §§ 6.4.2.1, 6.4.3.1; *id.* Pt. III, § 3.0.

As a result of these and other cleanup efforts at the Site, more than 800 residential and commercial properties have been cleaned up; 10 million cubic yards of tailings, mine wastes, and contaminated soils have been removed; 500 million cubic yards of waste over 5000 acres of land have been capped in place; and 12,500 acres of land have been reclaimed. EPA, *Superfund Priority "Anaconda"* 9 (Apr. 2018), https://go.usa.gov/xVxYh. Considerable work at the Site still remains. EPA's plans call for the cleanup of more than 1000 additional residential yards, revegetation of 7000 acres of upland soils, and removal and closure of waste areas, stream banks, and railroad beds. EPA, *Fifth Five-Year Review Report: Anaconda Smelter Superfund Site, Anaconda-Deer Lodge County, Montana* Tbl. 10-1 (Sept. 2015),

https://go.usa.gov/xVxgZ. EPA projects that active remediation work will remain ongoing at the Site until at least 2025. See *id.* Tbl. 10-7.

**C. Restoration Damages Under Montana Law**

Under Montana law, several forms of damages are available for an injury to property. Generally, the "difference between the value of the property before and after the injury, or the diminution in value, * * * constitutes the appropriate measure of damages." *Sunburst Sch. Dist. No. 2* v. *Texaco, Inc.*, 165 P.3d 1079, 1086 (Mont. 2007). In its 2007 *Sunburst* decision, however, the Montana Supreme Court held that a different and potentially greater form of damages—"restoration damages"—may be available under certain circumstances. *Ibid.* Restoration damages compensate a property owner for the reasonable costs of restoring the damaged property to its condition before the injury, even if that amount exceeds the lost property value. See *ibid.* Thus, if contamination of a property reduces its value by $25,000 and would cost $50,000 to remediate, restoration damages could allow the owner to obtain the higher amount. See *ibid.*; Restatement (Second) of Torts § 929(1)(a) & cmt. b (1979) (Restatement).

Under Montana law, restoration damages are available only when several conditions are satisfied. First, the injury must be "temporary," *Sunburst*, 165 P.3d at 1086, which means it must be "reasonably abatable," Pet. App. 6a. If no "more than a theoretical possibility" exists that the injury could be repaired, the injury is "permanent," and restoration damages are unavailable. *Sunburst*, 165 P.3d at 1086. Second, the injured party must have "reasons personal," such as a desire to continue living in a family home, for seeking to restore the

property rather than collecting the diminution in market value. *Id.* at 1087; see Restatement § 929 cmt. b.

Of particular relevance here, to satisfy the "reasons personal" element of a Montana claim for restoration damages, the injured party must "establish that the award actually will be used for restoration." *Lampi* v. *Speed*, 261 P.3d 1000, 1006 (Mont. 2011). That requirement ensures that a plaintiff does not receive an improper "windfall" by obtaining extra-compensatory damages that can be used for unrelated purposes. *Sunburst*, 165 P.3d at 1089. In *Sunburst*, for example, the Montana Supreme Court approved a restoration-damages award where injured homeowners presented evidence that they "actually will use the award of restoration damages to remediate the groundwater contamination" caused by the defendant's refinery. *Ibid.*

**D. Proceedings Below**

1. Respondents own property within the 300-square-mile Site. Pet. App. 4a. In 2008, they sued petitioner in a Montana trial court, asserting claims based on common-law trespass, nuisance, and strict liability. *Id.* at 5a. They sought damages to compensate for lost property values, *id.* at 6a, but their "primary goal" was "to have their properties restored," *id.* at 43a. They accordingly sought restoration damages, which would "be placed in a trust account and distributed only for the purpose of conducting restoration work." *Id.* at 5a.

In asserting their claims for restoration damages, respondents "sought the opinion of outside experts to determine what actions would be necessary to fully restore their properties to pre-contamination levels." Pet. App. 4a. Among other measures, the experts recommended removing "the top two feet of soil from af-

fected properties and install[ing] permeable walls to remove arsenic from the groundwater." *Ibid.* Both proposals "required restoration work in excess of what the EPA required * * * in its selected remedy." *Ibid.* Respondents' experts also proposed "a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA," as well as "transporting the excavated soil to Missoula or Spokane rather than to" local repositories, as required by EPA. *Id.* at 72a.[1]

2. Petitioner sought to remove the case to federal court on grounds of fraudulent joinder or federal-officer removal, see 28 U.S.C. 1442, but the federal district court remanded. No. 08-cv-45, 2008 U.S. Dist. LEXIS 123882. Petitioner then argued that respondents' claims were untimely, and the state trial court agreed, but the Montana Supreme Court reversed. 358 P.3d 131.

On remand to the trial court, petitioner moved for summary judgment on respondents' claims for restoration damages. Pet. App. 42a. As relevant here, petitioner argued that (1) CERCLA Section 113(h)'s bar on "challenges" to response actions selected by EPA, 42 U.S.C. 9613(h), precluded the court from exercising jurisdiction; and (2) respondents were potentially responsible parties (PRPs) who could not "undertake any remedial action" at the Site without EPA approval under CERCLA Section 122(e)(6), 42 U.S.C. 9622(e)(6). Pet. App. 43a. Petitioner also contended that respondents' claims for restoration damages were preempted by CERCLA, and respondents moved for summary

[1] Respondents have subsequently modified their proposals in some respects. EPA has also amended its remedy in some respects. As explained further below, the measures proposed by respondents' experts still conflict with EPA's remedy in fundamental ways.

judgment on that issue. *Id.* at 42a. The state court ruled for respondents on both motions, allowing the claims for restoration damages to proceed to trial. *Id.* at 41a-55a.

3. Petitioner asked the Montana Supreme Court to issue a writ of supervisory control, "an extraordinary remedy" that is "sometimes justified" when "the case involves purely legal questions." Mont. R. App. P. 14(3). The court "accepted supervisory control of th[e] case for the limited purpose of considering the" trial court's decision that respondents' claims for restoration damages were not barred or preempted by CERCLA. Pet. App. 3a. The court invited the United States to participate as amicus curiae, and the government filed a brief contending that the trial court had erred on each of the issues it had resolved. *Id.* at 56a-80a.

The Montana Supreme Court affirmed. Pet. App. 1a-40a. As a threshold matter, the court observed that CERCLA Section 113(h)'s withdrawal of jurisdiction over "'challenges'" to EPA remedies lacks "any reference to state court jurisdiction." *Id.* at 9a (citation omitted). The court recognized that CERCLA Section 113(b) gives federal courts exclusive jurisdiction over "all controversies arising under" CERCLA." *Ibid.* (quoting 42 U.S.C. 9613(b)). The court also noted that the Ninth Circuit has construed the term "controversies arising under [CERCLA]" in Section 113(b) to encompass all "challenges" to EPA response actions under Section 113(h). *Ibid.* (quoting *ARCO Envtl. Remediation, L.L.C.* v. *Department of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000)) (brackets in original).

The Montana Supreme Court declined to decide whether that Ninth Circuit analysis is correct, however, because it concluded that respondents' claims were not

"challenges" under Section 113(h). Pet. App. 10a-15a. In the court's view, "a § 113(h) challenge must actively interfere with EPA's work, as when the relief sought would stop, delay, or change the work EPA is doing." *Id.* at 11a. The court observed that respondents were "not seeking to enjoin any of EPA's activities, or requesting that EPA be required to alter, delay, or expedite its plan in any fashion," but were "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." *Id.* at 13a. The court concluded that respondents' claims therefore were not "challenges" and did not "implicate § 113(h) [o]r * * * § 113(b)." *Id.* at 15a.

The Montana Supreme Court next held that respondents were not PRPs subject to CERCLA Section 122(e)(6)'s requirement that PRPs obtain EPA authorization before "undertak[ing] any remedial action" at the Site. 42 U.S.C. 9622(e)(6). The court observed that respondents had not caused the contamination and had "never been treated as PRPs for any purpose." Pet. App. 16a. The court declined to treat respondents as PRPs "solely for the purpose of using § 122(e)(6) to bar their claim for restoration damages." *Id.* at 17a.

Finally, the Montana Supreme Court held that CERCLA did not preempt respondents' claims for restoration damages "for the same reason that § 113(h) does not apply: [respondents'] claim does not prevent the EPA from accomplishing its goals at the" cleanup site. Pet. App. 17a. The court added that CERCLA's savings clauses "expressly contemplate the applicability of state law remedies." *Ibid.*

Justice Baker issued a concurring opinion. Pet. App. 19a-23a. She reiterated the elements of a Montana

claim for restoration damages, including that an injury is considered "temporary" only if the "proposed restoration plan is * * * feasible." *Id.* at 22a. In her view, petitioner could "rebut" that "essential element[] of proof" by showing that respondents' "proposed remedy conflicts with or requires modification of measures [petitioner] already has taken to clean up the site." *Ibid.*

Justice McKinnon dissented. Pet. App. 23a-40a. In her view, CERCLA Sections 113(b) and (h) "in conjunction * * * divest state courts of jurisdiction to review any state law claim which amounts to a challenge of a CERCLA removal or remedial action." *Id.* at 29a. She would have held that respondents' claims for restoration damages are "challenges" under Section 113(h) because they are "plainly contrary to the EPA's remediation plan." *Id.* at 38a-39a. Among other conflicts, she noted that respondents "advocate a lower level of arsenic in the soil than that proposed by the EPA[,] * * * propose excavating the soil to a deeper level," and "propose that a series of underground trenches and barriers be constructed to capture and treat shallow groundwater," even though "EPA maintains" that such an approach "could unintentionally contaminate both ground and surface water." *Id.* at 38a.

## SUMMARY OF ARGUMENT

The Montana Supreme Court committed multiple errors of federal law in allowing respondents' claims for restoration damages to proceed to trial. The judgment below should be reversed, and respondents' claims for restoration damages should be dismissed.

A. This Court has jurisdiction under 28 U.S.C. 1257(a) to review the Montana Supreme Court's decision. Although the decision below did not terminate the litigation, it terminated the original proceeding in the

Montana Supreme Court on the writ of supervisory control. This Court has viewed such decisions as "[f]inal" for purposes of Section 1257 jurisdiction. *Ibid.*

B. The Montana courts lacked jurisdiction over respondents' claims for restoration damages. As relevant here, CERCLA Section 113(b) vests federal courts with "exclusive original jurisdiction over all controversies arising under" CERCLA, "[e]xcept as provided in" Section 113(h). 42 U.S.C. 9613(b). Section 113(h) states, with limited exceptions that are inapplicable here, that "[n]o Federal court shall have jurisdiction * * * to review any challenges" to an EPA response action. 42 U.S.C. 9613(h).

Read together, those provisions indicate that the category of "controversies arising under" CERCLA that are subject to exclusive federal jurisdiction under Section 113(b) necessarily includes all "challenges" to EPA response actions under Section 113(h). Because respondents' claims for restoration damages are premised on the alleged feasibility and appropriateness of cleanup activities that would contradict—indeed, physically undo—EPA's selected remedy, those claims raise "challenges" to EPA's response actions under Section 113(h) and thereby constitute "controversies arising under" CERCLA for purposes of Section 113(b). The claims, moreover, necessarily require resolution of CERCLA issues—such as whether respondents' proposed cleanup can be implemented—which underscores that they create "controversies arising under" CERCLA subject to the "exclusive" jurisdiction of federal district courts. 42 U.S.C. 9613(b).

C. Even if the Montana courts had jurisdiction to consider respondents' claims for restoration damages,

those claims should have been dismissed under principles of conflict preemption. Congress enacted CERCLA to ensure that a single entity—here, EPA—has authority to direct a timely and effective cleanup. CERCLA creates important but limited roles for the public, landowners at Superfund sites, and States in the selection and implementation of a remedy. The Montana Supreme Court's decision disregards those carefully designed roles by allowing a state jury to award damages for cleanup activities that do not comport with CERCLA's substantive or procedural standards. The conflict with federal law is particularly apparent here, because respondents' claims contemplate restoration work that would require physically reversing parts of EPA's cleanup, thereby making it impossible to execute respondents' proposed remedy while also maintaining the CERCLA-directed remedy.

D. Respondents' claims for restoration damages cannot proceed for the additional reason that respondents are PRPs who must obtain EPA's authorization to undertake "any remedial action" at the Site, 42 U.S.C. 9622(e)(6), but have not done so. The Montana Supreme Court concluded that respondents are not PRPs for purposes of that requirement because they have not been sued for causing the contamination at the Site. But respondents are PRPs under the plain text of CERCLA because they "own[]" land within the Site. 42 U.S.C. 9607(a)(1). Because respondents' restoration-damages claims require proof that their proposed work at the Site is feasible and appropriate, those claims cannot succeed unless and until respondents show they will obtain the authorization required by CERCLA.

## ARGUMENT

### RESPONDENTS' CLAIMS FOR RESTORATION DAMAGES SHOULD BE DISMISSED

#### A. This Court Has Jurisdiction Under 28 U.S.C. 1257

Respondents contest (Br. in Opp. 15-18) this Court's jurisdiction under 28 U.S.C. 1257(a), which authorizes the Court to review "[f]inal judgments * * * rendered by the highest court of a State." Although the issue is not free of doubt, this Court's precedents indicate that the "writ of supervisory control issued by the Montana Supreme Court" in this case "is a final judgment" that this Court may review under Section 1257. *Fisher* v. *District Court*, 424 U.S. 382, 385 n.7 (1976) (per curiam).

To be "final" for purposes of Section 1257, a state-court judgment "'must be * * * an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997) (citation omitted). The Montana Supreme Court's decision in this case did not terminate respondents' lawsuit; the court "remanded the case for further proceedings," including "a trial on the merits of the state-law claims." *Ibid.*; see Pet. App. 5a, 18a. The decision did, however, terminate the "original proceedings in the Montana Supreme Court" concerning the writ of supervisory control. *Fisher*, 424 U.S. at 385 n.7; see Pet. App. 1a, 3a, 5a, 18a. This Court has twice before exercised jurisdiction over Montana Supreme Court decisions that resolved writs of supervisory control, even though those state-court decisions contemplated further proceedings in a lower court. See *Fisher*, 424 U.S. at 385; *Kennerly* v. *District Court*, 400 U.S. 423, 424 (1971) (per curiam).

The posture of this case differs slightly from that of *Kennerly* and *Fisher*. In each of those cases, the Court

exercised jurisdiction under Section 1257 to review a "judgment that terminate[d] original proceedings in a state appellate court, *in which the only issue decided concern[ed] the jurisdiction of a lower state court*." 424 U.S. at 385 n.7 (emphasis added). Here, only one of the issues that the Montana Supreme Court decided—petitioner's contention that CERCLA Section 113 barred the claims for restoration damages—"concerns the jurisdiction of a lower state court." *Ibid.* But the Court in *Fisher* did not hold, and no sound rationale suggests, that Section 1257 confers jurisdiction to review a state-court decision terminating an original proceeding *only* when the decision resolves exclusively questions of lower-state-court jurisdiction. Section 1257 jurisdiction turns on finality, and the Montana Supreme Court's resolution of the nonjurisdictional issues in the original proceeding below was no less "[f]inal" than its resolution of the jurisdictional question. 28 U.S.C. 1257(a).

In *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8 (1931), the Court explained that a "proceeding for a writ of prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of" Section 1257(a)'s statutory predecessor. *Id.* at 14. While the issue in *Bandini* did involve state-court jurisdiction, this Court's explanation for its exercise of jurisdiction did not treat that fact as dispositive. See *ibid.*; cf. *Board of Educ.* v. *Superior Court*, 448 U.S. 1343, 1346 (1980) (Rehnquist, J., in chambers) (concluding that the Court "would in all probability have jurisdiction" over a state court's resolution of a "petition for a writ of mandamus and/or prohibition" because that petition "was a distinct lawsuit which was fully and finally determined by" a state supreme court). And at a

minimum, the Court has jurisdiction to review the Montana Supreme Court's resolution of the CERCLA Section 113 question, which "concerns the jurisdiction of a lower state court." *Fisher*, 424 U.S. at 385 n.7.

### B. The Montana State Courts Lacked Jurisdiction Over Respondents' Claims For Restoration Damages

Under CERCLA Section 113(b), federal district courts have "exclusive original jurisdiction over all controversies arising under" CERCLA "without regard to the citizenship of the parties or the amount in controversy," "[e]xcept as provided in" Sections 113(a) and (h). 42 U.S.C. 9613(b). Respondents' claims for restoration damages "arise[] under" CERCLA for purposes of Section 113(b)'s grant of exclusive federal-district-court jurisdiction, and the claims do not fall within any exception created by Section 113(a) or (h). *Ibid.* Section 113(b) accordingly divested the Montana state courts of jurisdiction over the claims for restoration damages.

1. CERCLA Section 113 establishes multiple limitations on CERCLA-related litigation. Section 113(a) requires a petition for "[r]eview of any regulation promulgated under" CERCLA to be filed in the D.C. Circuit "within ninety days" after the regulation is promulgated. 42 U.S.C. 9613(a). Section 113(b) states that, "[e]xcept as provided in [Sections 113](a) and (h)," federal "district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA], without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. 9613(b). Section 113(h), entitled "Timing of review," provides:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (re-

> lating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [in five enumerated circumstances where other CERCLA provisions authorize specific types of suit].

42 U.S.C. 9613(h).

2. In the Montana Supreme Court, the parties and the court focused on the question whether respondents' claims for restoration damages constitute "challenges," within the meaning of Section 113(h), to EPA's response action at the Site. 42 U.S.C. 9613(h); see Pet. App. 10a-15a. As explained further below, Section 113(b)—rather than Section 113(h)—is the specific provision that divests the Montana state courts of jurisdiction over respondents' claims for restoration damages. See pp. 22-27, *infra*. But Section 113(h) is relevant to the proper interpretation of Section 113(b), and the Montana Supreme Court's reading of Section 113(h) was mistaken.

Because "CERCLA does not specifically define" the term "challenges," 42 U.S.C. 9613(h), this Court should "give the [term] its ordinary meaning," *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 610-611 (2009). The ordinary meaning of a "challenge" is "the act of calling into question." *Webster's New International Dictionary of the English Language* 445 (2d ed. 1958). Federal courts of appeals have accordingly long held that a suit constitutes a "challenge" under Section 113(h) if it "calls into question," *New Mexico* v. *General Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006); *Broward Gardens Tenants Ass'n* v. *United States EPA*,

311 F.3d 1066, 1073 (11th Cir. 2002), or "would second-guess," *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 330 (9th Cir.), cert. denied, 516 U.S. 807 (1995), EPA's selected response action.

Under that ordinary meaning, respondents' claims for restoration damages constitute "challenges" to EPA's response action at the Site. 42 U.S.C. 9613(h). Montana law requires that restoration damages must "actually * * * be used to repair the damaged property." *Sunburst Sch. Dist. No. 2* v. *Texaco, Inc.*, 165 P.3d 1079, 1089 (Mont. 2007). Consistent with that state-law requirement, any restoration damages received by respondents "are to be placed in a trust account and distributed only for the purpose of conducting restoration work." Pet. App. 5a. As explained above, the restoration work that respondents propose to perform would contradict EPA's selected remedy in numerous ways. Respondents' experts proposed (1) to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA; (2) to excavate soil up to two feet rather than EPA's chosen depth of 12 inches; (3) to transport excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA; and (4) to capture and treat shallow groundwater through a series of underground trenches and barriers that EPA had determined could upset a balance that currently protects human health and the environment. See pp. 9-10, *supra*; Pet. App. 72a, 74a.

Despite those contradictions, the Montana Supreme Court concluded that respondents' claims for restoration damages did not present a "challenge" to EPA's remedy because the proposed restoration work would "not affect, alter, or delay EPA's work in any fashion." Pet. App. 14a. The court went on to state that claims

for restoration damages do "not implicate § 113(h) []or * * * § 113(b)" because respondents are "not seeking to compel EPA to do, or refrain from doing, any action." *Id.* at 15a.

That analysis reflects an unduly narrow reading of the statutory language. The remedial measures that respondents contemplate are inconsistent with, and indeed would *physically undo*, significant aspects of EPA's response actions. For example, respondents' proposal to excavate soil in residential yards to two feet rather than 12 inches would not simply require extra digging. When petitioner finishes remediating a yard, the EPA remedy requires that the yard be "capped or backfilled with clean soil." Pet. App. 73a. "Tearing up that protective cap or layer of soil * * * could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion." *Ibid.* Similarly, "[o]ffsite disposal of excavated soil," as respondents' experts propose, "would also increase the risk of dust transfer or contaminant ingestion." *Ibid.* And the underground "barriers proposed by [respondents'] experts * * * could unintentionally contaminate groundwater and surface water." *Id.* at 74a. Allowing claims premised on proposed restoration work that fundamentally contradicts—and in some ways would physically reverse—EPA's cleanup plan constitutes a "challenge[]" to a selected response action under any usual understanding of that term. 42 U.S.C. 9613(h); see Pet. App. 37a-39a (McKinnon, J., dissenting).

The Montana Supreme Court also observed that the federal appellate precedents referenced above (see pp. 19-20, *supra*) did not "involve a claim by private property owners, against another private party, seeking money damages for the purpose of restoring their

own private property." Pet. App. 12a. The court appeared to conclude that, because the entry of a money judgment standing alone would not compromise EPA's cleanup, respondents' claims for restoration damages did not constitute a Section 113(h) "challenge[]." *Ibid.* That analysis disregards the ways in which a claim for restoration damages under Montana law differs from a typical claim for money damages.

A landowner's request for an ordinary money-damages award, which would be based on the diminution in value of contaminated property and could be spent in whatever manner the recipient chose, would not constitute a "challenge" to an EPA response action. See Pet. App. 6a (noting that petitioner does not contend that respondents' other requests for money damages are barred "challenges"). But as explained above, respondents' entitlement to *restoration* damages depends on proof that their own proposed restoration activities are feasible and appropriate; any restoration damages received can be spent *only* on the approved restoration activities; and the restoration activities respondents propose would conflict with EPA's selected response action. See pp. 8-9, 20-21, *supra*. Respondents' claims thus present "challenges" to EPA's response action, even though the requested relief comes in the form of money damages. 42 U.S.C. 9613(h).

3. Although the parties and the court below focused on CERCLA Section 113(h), that provision is by its terms a limitation on the jurisdiction of any "Federal court." 42 U.S.C. 9613(h). It therefore does not directly resolve the question whether the Montana state courts could properly exercise jurisdiction over respondents' claims for restoration damages. The provision that directly resolves that question is Section 113(b), which

(with exceptions that are inapplicable here) gives federal district courts "exclusive original jurisdiction over all controversies arising under" CERCLA. 42 U.S.C. 9613(b). But subsections (b) and (h) should be read together, and Congress's treatment of "challenges" to EPA response actions sheds substantial light on the question whether respondents' claims for restoration damages "aris[e] under" CERCLA. 42 U.S.C. 9613(b) and (h); see *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 135 (2007) (emphasizing that CERCLA must be "read as a whole") (citation omitted).

a. The term "arising under" appears in Article III of the Constitution and in various federal statutes, but it has not been given a single uniform meaning. In construing the general federal-question jurisdiction statute, see 28 U.S.C. 1331 ("The district courts shall have original jurisdiction of all civil actions arising under [federal law]."), this Court has adopted a narrow interpretation of the term. For purposes of Section 1331, the determination whether a claim "arises under" federal law depends predominantly on whether "federal law creates the cause of action asserted." *Gunn* v. *Minton*, 568 U.S. 251, 257 (2013). Respondents' claims for restoration damages do not "arise under" CERCLA in that sense, because they are created by Montana law.[2]

In other legal contexts, however, this Court has adopted a broader construction of the term "arising un-

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[2] Even under Section 1331, a claim that "finds its origins in state rather than federal law" may still "aris[e] under" federal law in certain circumstances. *Gunn*, 568 U.S. at 258. Because this case does not involve Section 1331, the Court does not need to determine whether respondents' claims for restoration damages would fall within those circumstances.

der." For purposes of "'arising under'" jurisdiction under Article III, the Court has "upheld the constitutionality of a statute that granted the Bank of the United States the right to sue in federal court on causes of action based upon state law." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 492 (1983) (citation omitted); see *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 818-824 (1824). The Court's early decision in *Osborn* "reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden*, 461 U.S. at 492. In interpreting federal statutes as well, the Court has sometimes "construed the term ['arising under'] more broadly" than it has in Section 1331, based on "the context in which [the statute] was enacted and the purposes it was designed to accomplish." *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U.S. 369, 376-377 & n.7 (2004); see, *e.g.*, *Heckler* v. *Ringer*, 466 U.S. 602, 614 (1984).

b. Here, the statutory structure indicates that respondents' claims for restoration damages are "controversies arising under" CERCLA for purposes of Section 113(b), even though Montana law creates respondents' cause of action. 42 U.S.C. 9613(b). Taken together, the interlocking provisions within Section 113 direct "all controversies arising under" CERCLA to federal district court, "[e]xcept" that (i) an "application" for review of regulations promulgated under CERCLA must be filed in the D.C. Circuit, and (ii) "[n]o [f]ederal court shall have jurisdiction" over "challenges" to EPA response actions other than under the specific CERCLA provisions that are cross-referenced in Section

113(h)(1)-(5). 42 U.S.C. 9613(a), (b), and (h). That structure indicates that, at a minimum, every "application" for review of a CERCLA regulation under Section 113(a), and every "challenge[]" to an EPA response action under Section 113(h), is necessarily a "controvers[y] arising under" CERCLA for purposes of Section 113(b). *Ibid.* After all, Sections 113(a) and (h) operate as "except[ions]" to Section 113(b), 42 U.S.C. 9613(b), and exceptions must by definition be narrower than the corresponding rule. See *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012)). And as this case illustrates, a claim that calls for implementation of a cleanup that conflicts with—and thereby constitutes a challenge to—an EPA response action necessarily "call[s] for the application of" CERCLA, because it raises questions about the permissibility of the cleanup activities to which CERCLA supplies the answers. *Verlinden*, 461 U.S. at 492. The claim therefore "arises under" CERCLA, 42 U.S.C. 9613(b), in this distinctive statutory context. See *ARCO Envtl. Remediation, L.L.C.* v. *Department of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000) (adopting this reading of Section 113); *Fort Ord Toxics Project, Inc.* v. *California EPA*, 189 F.3d 828, 832 (9th Cir. 1999) (same).

The structural relationship among Section 113's subsections also explains why Section 113(h)'s jurisdictional limitation refers specifically to "*[f]ederal* court[s]." 42 U.S.C. 9613(h) (emphasis added). If every "challenge[]" to a CERCLA cleanup necessarily creates a "controvers[y] arising under" CERCLA, 42 U.S.C. 9613(b) and (h), then "only federal courts * * * have jurisdiction to adjudicate a 'challenge' to a CERCLA

cleanup in the first place," *Fort Ord*, 189 F.3d at 832 (citation omitted).

CERCLA's history reinforces that understanding. Congress enacted Section 113(b) in 1980 as part of the original CERCLA. § 113(b), 94 Stat. 2795. Congress added Section 113(h) in 1986, see SARA § 113(c)(2), 100 Stat. 1650, in response to concerns that "the scheme and purposes of CERCLA would be disrupted by affording judicial review of" EPA response actions, S. Rep. No. 11, 99th Cong., 1st Sess. 58 (1985). That chronology reinforces the inference that the "challenges" over which Section 113(h) restricts federal jurisdiction are a subset of the "controversies arising under" CERCLA over which Section 113(b) grants exclusive federal jurisdiction. 42 U.S.C. 9613(b) and (h); see SARA § 113(c)(1), 100 Stat. 1649 (amending the opening clause of Section 113(b) to read "[e]xcept as provided in subsection[] * * * (h)"). Indeed, Members of Congress explained that Section 113(h)'s "reference to '[f]ederal court' is simply to recognize existing section 113(b) of CERCLA, which provides that except for review of regulations, [f]ederal district courts have exclusive jurisdiction over all controversies under CERCLA." 132 Cong. Rec. 28,441 (1986) (statement of Sen. Thurmond); see 132 Cong. Rec. 29,736 (1986) (statement of Rep. Glickman) (similar).

Finally, Section 113(h)'s purpose—to "protect[] the execution of a CERCLA plan * * * from lawsuits that might interfere with the expeditious cleanup effort," *McClellan*, 47 F.3d at 329—underscores that all "challenges" must also be "controversies arising under" CERCLA subject to exclusive federal jurisdiction. 42 U.S.C. 9613(b) and (h). If, as respondents suggest, "challenges" to CERCLA response actions are barred

in federal court by Section 113(h) but may proceed without limitation in state court, Congress's purpose in enacting Section 113(h) would be frustrated. "Congress did not intend to preclude dilatory litigation in federal courts but allow such litigation in state courts." *Fort Ord*, 189 F.3d at 832; cf. *Atlantic Research*, 551 U.S. at 135 (explaining that one provision of CERCLA could properly be understood only "with reference to" a closely related provision); *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (similar).

c. In sum, respondents' claims for restoration damages call for the application of CERCLA and are therefore "controversies arising under" CERCLA subject to exclusive federal jurisdiction. 42 U.S.C. 9613(b). They are also "challenges" to EPA response actions, 42 U.S.C. 9613(h), which Congress necessarily considered to be a subset of the "controversies arising under" CERCLA that it channeled exclusively to federal court, 42 U.S.C. 9613(b). The Montana Supreme Court's erroneous conclusion that the claims do not "implicate § 113(h) [o]r * * * § 113(b)," Pet. App. 15a, should be reversed.

### C. Even If The Montana State Courts Had Jurisdiction, Respondents' Claims For Restoration Damages Are Preempted

The Montana Supreme Court devoted only a single paragraph of its opinion to petitioner's conflict-preemption argument. Pet. App. 17a-18a. The apparent thrust of the court's analysis was that, because respondents do not seek a judicial order that would prevent EPA from conducting its own response action, their state-law claims cannot be preempted. In reaching that conclusion, the court relied in part on CERCLA's savings clauses. See *ibid.* That analysis reflects

an unduly narrow conception of conflict preemption under CERCLA.

Conflict preemption bars a state-law claim that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (citation omitted). The purpose of CERCLA is "to promote the timely cleanup of hazardous waste sites." *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 4 (2014) (citation and internal quotation marks omitted). More specifically, Congress enacted CERCLA to fill a gap in federal law that had previously prevented the timely and efficient cleanup of contaminated sites, see p. 2, *supra*, and CERCLA filled that gap by vesting a single entity—the federal government—with exclusive authority to select and oversee the implementation of remedial plans at Superfund sites, see 42 U.S.C. 9604, 9606, 9617, 9621-9622.

CERCLA sets out a detailed process for the selection of a remedy and identifies specific standards that must be considered as part of a remedy. Of particular relevance here, CERCLA directs that States be given the opportunity to have "substantial and meaningful involvement * * * in initiation, development, and selection of" EPA remedies, 42 U.S.C. 9621(f)(1), and that EPA response actions comply with more stringent "applicable or relevant and appropriate" requirements (ARAR) of state environmental law (unless those requirements are waived), 42 U.S.C. 9621(d)(4), (f)(2)(A); see 40 C.F.R. 300.400(g) (explaining EPA's approach for identifying ARAR); 40 C.F.R. 300.515(f) (providing that a State may enhance an EPA-selected remedy if the enhancement would not be inconsistent with the remedy and the State agrees to fund the additional cost associated with the enhancement). Finally, to protect

the remedy against disruption, CERCLA establishes circumscribed mechanisms for judicial review. See 42 U.S.C. 9613.[3]

Respondents' approach conflicts in multiple ways with the legislative judgments embodied in CERCLA. Rather than providing information that might assist EPA in selecting an appropriate remedy, respondents seek "to present their own plan * * * to a jury of twelve Montanans." Pet. App. 13a. Rather than applying the health-based standards selected by EPA under CERCLA or incorporated through state environmental law, respondents rely on "differ[ent]" standards devised by their experts and the jury's "assess[ment of] the merits of th[eir] plan." *Id.* at 13a, 14a.[4] And rather than complying with CERCLA's provisions on the timing and

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[3] Through its citizen-suit provision, 42 U.S.C. 9659, CERCLA provides a mechanism by which private parties like respondents can seek judicial relief if they view an EPA response action as inadequate. See 42 U.S.C. 9613(h)(4) (identifying an "action under section 9659 of this title" as an exception to Section 113(h)'s general bar on "challenges" to EPA response actions). Respondents' current state-court suit for restoration damages, however, is inconsistent with several limitations that CERCLA places on citizen suits. A CERCLA citizen suit must be filed in federal district court, 42 U.S.C. 9659(b)(1) and (2); the court's review is "limited to the administrative record," 42 U.S.C. 9613(j)(1); the court applies a familiar administrative-law standard to determine whether EPA's "decision in selecting the response action * * * was arbitrary and capricious or otherwise not in accordance with law," 42 U.S.C. 9613(j)(2); and the relief that may be awarded is limited to remedies consistent with the National Contingency Plan, 42 U.S.C. 9613(j)(3).

[4] Respondents do not base their claims for restoration damages on any state law that would qualify as an ARAR of state environmental law under 42 U.S.C. 9621(d). In their complaint, respondents cite the Montana Constitution, which directs that the "state and

manner of judicial review (see pp. 3-4, 28-29 & n.3, *supra*), respondents have asserted their claims during a cleanup, in a state court, without any limitation to the administrative record. Respondents' claims for restoration damages thus cannot be reconciled with "Congress' considered judgment as to the best method of" cleaning up contaminated sites. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 497 (1987). Indeed, "[i]t would be extraordinary for Congress, after devising an elaborate [cleanup] system that sets clear standards, to tolerate common-law suits that have the potential to undermine" that statutory scheme. *Ibid.*

More narrowly, the particular claims for restoration damages asserted by respondents in this case are preempted because they conflict with the particular remedy selected by EPA. See, *e.g.*, *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (holding that a state-law claim is preempted where it "interferes with or is contrary to federal law") (citation omitted). As explained above, the restoration plan respondents have proposed would conflict with, and in significant respects would undo, EPA's own response action. See pp. 9-10, 20-21, *supra*. Indeed, it would be

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each person shall maintain and improve a clean and healthful environment in Montana." Mont. Const. Art. IX, § 1; see J.A. 54-55. That constitutional provision does not qualify as an ARAR of state environmental law under EPA's regulatory definition because it is not an "identified" "standard[]" that is "more stringent than federal requirements." 40 C.F.R. 300.400(g)(4). To fulfill that state constitutional directive, Montana has enacted environmental statutes and promulgated environmental regulations that do qualify as ARAR of state environmental law, see Mont. Code Ann. §§ 75-1-202 to 75-26-310 (2017); Mont. Admin. R. 17.1.101 to 17.86.122 (2018), and EPA considered those standards in developing its cleanup plan at the Site, see Soils ROD § 10.2, at DS-49; Water ROD § 10.2, at DS-99.

impossible for either petitioner or respondents to implement the restoration-damages remedy that respondents propose and to comply with CERCLA. See 42 U.S.C. 9622(e)(6) (barring "any remedial action" that has not "been authorized by [EPA]"); 40 C.F.R. 300.435(b)(1) (requiring all remedial activities to be "in conformance with the remedy [EPA] selected and set forth"). Principles of impossibility preemption, in addition to broader conflict preemption, therefore foreclose respondents' claims for restoration damages. See, *e.g.*, *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1672 (2019); *Mutual Pharm. Co.* v. *Bartlett*, 570 U.S. 472, 486-487 (2013).

To be sure, if respondents' claims for restoration damages are allowed to proceed and the suit culminates in a monetary award, EPA could seek to prevent respondents from using those funds to carry out any remedial actions that the agency believed would violate federal law. See 42 U.S.C. 9606(a) and 9622(e)(6). As a non-party to this lawsuit, EPA would not be bound by a state-court judgment that respondents' proposed remedial actions are feasible and appropriate. But the prospect that EPA might ultimately invoke alternative enforcement mechanisms to protect the integrity of its remedy does not alleviate the basic conflict between respondents' state-law theory and the dictates of federal law.

In rejecting petitioner's conflict-preemption argument, the Montana Supreme Court relied almost entirely on CERCLA's savings clauses. Pet. App. 17a-18a. But the presence of statutory savings clauses "does *not* bar the ordinary working of conflict pre-emption principles." *Geier* v. *American Honda Motor Co.*, 529 U.S.

861, 869 (2000); see *Ouellette*, 479 U.S. at 494, 497 (finding conflict preemption despite savings clauses); *New Mexico*, 467 F.3d at 1247 (same under CERCLA). That is particularly true where, as here, "giv[ing] broad effect to saving clauses * * * would upset the careful regulatory scheme established by federal law." *Geier*, 529 U.S. at 870 (citation omitted). CERCLA's savings clauses might allow a state-law claim that does not seek to undo an EPA remedy—for example, an ordinary tort claim seeking money damages that compensates landowners for diminution in the value of their property. But the savings clauses do not permit circumvention of Congress's careful judgments about the limited ways in which States and landowners can seek to influence an EPA remedy. See *ibid.* And those congressional judgments foreclose the state-law claims at issue here, which can succeed only if respondents persuade a jury that restoration activities inconsistent with EPA's remedial plans are feasible and appropriate. Thus, even if CERCLA Section 113(b) did not divest the state courts of jurisdiction over respondents' restoration-damages claims, the Montana Supreme Court should have found those claims to be preempted.

### D. Respondents' Claims For Restoration Damages Cannot Proceed Without EPA Authorization Under CERCLA Section 122(e)(6)

Section 122(e)(6) of CERCLA provides that "[w]hen either [EPA], or a [PRP] * * * has initiated a remedial investigation and feasibility study for a particular facility * * * , no [PRP] may undertake any remedial action at the facility unless such remedial action has been authorized by [EPA]." 42 U.S.C. 9622(e)(6). It is undisputed that EPA and petitioner, a PRP acting at EPA's direction, have "initiated a remedial investigation and

feasibility study for" the Site. *Ibid.* There is likewise no dispute that EPA has not "authorized" the "remedial action" that respondents propose to "undertake" if they are awarded restoration damages, which under Montana law can be spent only for specified restoration work on their properties. *Ibid.*; see 42 U.S.C. 9601(24) (defining "remedial action" to include, among other things, "cleanup of released hazardous substances," "dredging or excavations," or "offsite transport" and "disposition of hazardous substances"). The Montana Supreme Court concluded, however, that respondents are not PRPs and therefore did not require EPA authorization before undertaking their proposed remedial action. See Pet. App. 15a-16a. That holding was erroneous.

CERCLA does not define the term "potentially responsible party." This Court's decisions, however, have uniformly treated the term as corresponding to the "[c]overed persons" identified in CERCLA Section 107(a), which imposes liability for the costs of a CERCLA cleanup (subject to defenses and exceptions set forth elsewhere in the statute). 42 U.S.C. 9607(a) (emphasis omitted); see *Burlington*, 556 U.S. at 608-610; *Atlantic Research*, 551 U.S. at 131-132; *Cooper Indus.*, 543 U.S. at 161. Of particular relevance here, the covered persons identified in Section 107(a) include the "owner" of a "facility," 42 U.S.C. 9607(a)(1), and the term "'facility'" is in turn defined as "any site or area where a hazardous substance has been deposited," 42 U.S.C. 9601(9)(B). Because respondents own land where a hazardous substance has been deposited, they are "covered persons" under a straightforward reading

of the statutory text. EPA has accordingly informed respondents that they will be treated as PRPs at the Site. See Pet. Br. App. 1a-3a.

The Montana Supreme Court acknowledged that PRPs ordinarily include "all current owners of property at a CERCLA facility," a category that includes respondents. Pet. App. 15a. The court declined to "treat [respondents] as PRPs under § 122(e)(6)," however, because respondents were not responsible for the contamination or the costs of the cleanup. *Id.* at 16a. That reading conflates *status* as a PRP with *liability for the payment of response costs* based on that status. Cf. Br. in Opp. 31-32 (contending that respondents are not PRPs because "they face no prospect of liability"). Under longstanding policy, EPA generally does not seek to recover costs from residential landowners who are not responsible for contamination and do not interfere with EPA's remedy. See EPA, *Policy Towards Owners of Residential Property at Superfund Sites* (July 3, 1991), https://go.usa.gov/xVbmN. But that does not change the fact that "even parties not responsible for contamination may fall within the broad definitions of PRPs in" Section 107(a). *Atlantic Research*, 551 U.S. at 136. Indeed, even an "'innocent' * * * landowner whose land has been contaminated by another" party may be a PRP. *Ibid.*

Because respondents are PRPs, they must obtain EPA authorization before they "undertake any remedial action at the" Site. 42 U.S.C. 9622(e)(6). And as explained above, one of the elements of a Montana restoration-damages claim is that the proposed remedial work will actually abate the damage to their property. See pp. 8-9, 20, 22, *supra*. If Section 122(e)(6) would preclude respondents from carrying out their

proposed restoration plan, they cannot demonstrate that their proposed cleanup activities will actually remedy that damage, and their claim accordingly cannot succeed "on the merits." Pet. App. 14a.

## CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted.

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## APPENDIX

1. 28 U.S.C. 1257(a) provides:

**State courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

2. 42 U.S.C. 9601 provides in pertinent part:

**Definitions**

For purpose of this subchapter—

* * * * *

(9) The term "facility" means * * * (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

* * * * *

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

* * * * *

3. 42 U.S.C. 9604(a)(1) provides:

**Response authorities**

**(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception**

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with

the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

4. 42 U.S.C. 9606(a) provides:

**Abatement actions**

**(a) Maintenance, jurisdiction, etc.**

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.

5. 42 U.S.C. 9607(a)-(b) provides:

**Liability**

**(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date**

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(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, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

**(b) Defenses**

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly,

with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

6. 42 U.S.C. 9613 provides:

**Civil proceedings**

**(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia**

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

**(b) Jurisdiction; venue**

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

**(c) Controversies or other matters resulting from tax collection or tax regulation review**

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II[1] of this chapter, or to the review of any regulation promulgated under title 26.

**(d) Litigation commenced prior to December 11, 1980**

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

**(e) Nationwide service of process**

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

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[1] See References in Text note below.

**(f) Contribution**

**(1) Contribution**

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

**(2) Settlement**

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

**(3) Persons not party to settlement**

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State

in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

**(g) Period in which action may be brought**

**(1) Actions for natural resource damages**

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

**(2) Actions for recovery of costs**

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

**(3) Contribution**

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to

cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

**(4) Subrogation**

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

**(5) Actions to recover indemnification payments**

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

**(6) Minors and incompetents**

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal

representative is duly appointed for such incompetent.

**(h) Timing of review**

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

**(i) Intervention**

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

**(j) Judicial review**

**(1) Limitation**

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

**(2) Standard**

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

**(3) Remedy**

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

**(4) Procedural errors**

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

**(k) Administrative record and participation procedures**

**(1) Administrative record**

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

**(2) Participation procedures**

**(A) Removal action**

The President shall promulgate regulations in accordance with chapter 5 of title 5 establishing procedures for the appropriate participation of interested persons in the development of the admin-

istrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

**(B) Remedial action**

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of title 5 to carry out the requirements of this subparagraph.

**(C) Interim record**

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing.

**(D) Potentially responsible parties**

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

**(*l*) Notice of actions**

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

7. 42 U.S.C. 9614(a) provides:

**Relationship to other law**

**(a) Additional State liability or requirements with respect to release of substances within State**

Nothing in this chapter 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.

8. 42 U.S.C. 9617(a)-(d) provides:

**Public participation**

**(a) Proposed plan**

Before adoption of any plan for remedial action to be undertaken by the President, by a State, or by any other person, under section 9604, 9606, 9620, or 9622 of this title, the President or State, as appropriate, shall take both of the following actions:

(1) Publish a notice and brief analysis of the proposed plan and make such plan available to the public.

(2) Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan and regarding any proposed findings under section 9621(d)(4) of this title (relating to cleanup standards). The President or the State shall keep a transcript of the meeting and make such transcript available to the public.

The notice and analysis published under paragraph (1) shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternative proposals considered.

**(b) Final plan**

Notice of the final remedial action plan adopted shall be published and the plan shall be made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations under subsection (a) of this section.

**(c) Explanation of differences**

After adoption of a final remedial action plan—

(1) if any remedial action is taken,

(2) if any enforcement action under section 9606 of this title is taken, or

(3) if any settlement or consent decree under section 9606 of this title or section 9622 of this title is entered into,

and if such action, settlement, or decree differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differences and the reasons such changes were made.

**(d) Publication**

For the purposes of this section, publication shall include, at a minimum, publication in a major local newspaper of general circulation. In addition, each item developed, received, published, or made available to the public under this section shall be available for public inspection and copying at or near the facility at issue.

9. 42 U.S.C. 9621 provides in pertinent part:

**Cleanup standards**

**(a) Selection of remedial action**

The President shall select appropriate remedial actions determined to be necessary to be carried out under section 9604 of this title or secured under section 9606 of this title which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response. In evaluating the cost effectiveness of proposed alternative remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

**(b) General rules**

(1) Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment. The

offsite transport and disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available. The President shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant. In making such assessment, the President shall specifically address the long-term effectiveness of various alternatives. In assessing alternative remedial actions, the President shall, at a minimum, take into account:

(A) the long-term uncertainties associated with land disposal;

(B) the goals, objectives, and requirements of the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.];

(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;

(D) short- and long-term potential for adverse health effects from human exposure;

(E) long-term maintenance costs;

(F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and

(G) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. If the President selects a remedial action not appropriate for a preference under this subsection, the President shall publish an explanation as to why a remedial action involving such reductions was not selected.

(2) The President may select an alternative remedial action meeting the objectives of this subsection whether or not such action has been achieved in practice at any other facility or site that has similar characteristics. In making such a selection, the President may take into account the degree of support for such remedial action by parties interested in such site.

**(c) Review**

If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if upon such review it is the judgment of the President that action is appropriate at such site in accordance with section 9604 or 9606 of this title, the President shall take or require such action. The President shall report to the Congress a list of facilities for which such review is required, the results of all such reviews, and any actions taken as a result of such reviews.

**(d) Degree of cleanup**

(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.

(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if—

(i) any standard, requirement, criteria, or limitation under any Federal environmental law, including, but not limited to, the Toxic Substances Control Act [15 U.S.C. 2601 et seq.], the Safe Drinking Water Act [42 U.S.C. 300f et seq.], the Clean Air Act [42 U.S.C. 7401 et seq.], the Clean Water Act [33 U.S.C. 1251 et seq.], the Marine Protection, Research and Sanctuaries Act [16 U.S.C. 1431 et seq., 1447 et seq., 33 U.S.C. 1401 et seq., 2801 et seq.], or the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.]; or

(ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been

identified to the President by the State in a timely manner,

is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 9604 of this title or secured under section 9606 of this title shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. Such remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act [42 U.S.C. 300f et seq.] and water quality criteria established under section 304 or 303 of the Clean Water Act [33 U.S.C. 1314, 1313], where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release.

* * * * *

**(f) State involvement**

(1) The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State. The regulations, at a minimum, shall include each of the following:

(A) State involvement in decisions whether to perform a preliminary assessment and site inspection.

(B) Allocation of responsibility for hazard ranking system scoring.

(C) State concurrence in deleting sites from the National Priorities List.

(D) State participation in the long-term planning process for all remedial sites within the State.

(E) A reasonable opportunity for States to review and comment on each of the following:

(i) The remedial investigation and feasibility study and all data and technical documents leading to its issuance.

(ii) The planned remedial action identified in the remedial investigation and feasibility study.

(iii) The engineering design following selection of the final remedial action.

(iv) Other technical data and reports relating to implementation of the remedy.

(v) Any proposed finding or decision by the President to exercise the authority of subsection (d)(4) of this section.

(F) Notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State and an opportunity to participate in such negotiations and, subject to paragraph (2), be a party to any settlement.

(G) Notice to the State and an opportunity to comment on the President's proposed plan for remedial action as well as on alternative plans under consideration. The President's proposed decision regarding the selection of remedial action shall be accompanied by a response to the comments submitted by the State, including an explanation regarding any decision under subsection (d)(4) of this section on compliance with promulgated State standards. A copy of such response shall also be provided to the State.

(H) Prompt notice and explanation of each proposed action to the State in which the facility is located.

Prior to the promulgation of such regulations, the President shall provide notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State, and such State may participate in such negotiations and, subject to paragraph (2), any settlements.

(2)(A) This paragraph shall apply to remedial actions secured under section 9606 of this title. At least 30 days prior to the entering of any consent decree, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4) of this section, the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, the State may become a signatory to the consent decree.

(B) If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 9606 of this title before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard, requirement, criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree.

(C) The President may conclude settlement negotiations with potentially responsible parties without State concurrence.

(3)(A) This paragraph shall apply to remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States. At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, require-

ment, criteria, or limitation, under the authority of subsection (d)(4) of this section, the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.

(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State may maintain an action as follows:

(i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.

(ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evidence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.

(iii) If the State fails to establish that the President's finding was not supported by substantial evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails

to pay within 60 days, the remedial action selected by the President shall proceed through completion.

(C) Nothing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation.

10. 42 U.S.C. 9622 provides in pertinent part:

**Settlements**

**(a) Authority to enter into agreements**

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. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

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**(e) Special notice procedures**

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**(6) Inconsistent response action**

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

* * * * *

11. 42 U.S.C. 9652(d) provides:

**Effective dates; savings provisions**

(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

12. 42 U.S.C. 9659 provides in pertinent part:

**Citizens suits**

**(a) Authority to bring civil actions**

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 9660 of this title (relating to research, development, and demonstration).

**(b) Venue**

**(1) Actions under subsection (a)(1)**

Any action under subsection (a)(1) of this section shall be brought in the district court for the district in which the alleged violation occurred.

**(2) Actions under subsection (a)(2)**

Any action brought under subsection (a)(2) of this section may be brought in the United States District Court for the District of Columbia.

**(c) Relief**

The district court shall have jurisdiction in actions brought under subsection (a)(1) of this section to enforce the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title), to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The district court shall have jurisdiction in actions brought under subsection (a)(2) of this section to order the President or other officer to perform the act or duty concerned.

* * * * *

**(h) Other rights**

This chapter 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).

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13. 40 C.F.R. 300.400(g) provides in pertinent part:

**General.**

(g) *Identification of applicable or relevant and appropriate requirements.* * * *

* * * * *

(4) Only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements may be applicable or relevant and appropriate. For purposes of identification and notification of promulgated state standards, the term *promulgated* means that the standards are of general applicability and are legally enforceable.

* * * * *

14. 40 C.F.R. 300.435(a)-(b) provides:

**Remedial design/remedial action, operation and maintenance.**

(a) *General.* The remedial design/remedial action (RD/RA) stage includes the development of the actual design of the selected remedy and implementation of the remedy through construction. A period of operation and maintenance may follow the RA activities.

(b) *RD/RA activities.* (1) All RD/RA activities shall be in conformance with the remedy selected and set forth in the ROD or other decision document for that site. Those portions of RD/RA sampling and analysis plans describing the QA/QC requirements for chemical and analytical testing and sampling procedures of samples taken for the purpose of determining whether cleanup action levels specified in the ROD are achieved, generally will be consistent with the requirements of § 300.430(b)(8).

(2) During the course of the RD/RA, the lead agency shall be responsible for ensuring that all federal and state requirements that are identified in the ROD as applicable or relevant and appropriate requirements for the action are met. If waivers from any ARARs are involved, the lead agency shall be responsible for ensuring that the conditions of the waivers are met.