Message

From: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Sent: 1/31/2018 3:22:41 PM
To: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]; Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: RE: reschedule our Feb 1 meeting

Nick –

Awesome -thanks.

Steve
Stephen P. Risotto
srisotto@americanchemistry.com
Personal Matters / Ex. 6 (voice)
(mobile)

From: Falvo, Nicholas [mailto:falvo.nicholas@epa.gov]
Sent: Wednesday, January 31, 2018 9:29 AM
To: Risotto, Steve; Kelly, Albert
Subject: RE: reschedule our Feb 1 meeting

March 1 at 1:00 works for us. See you then.

From: Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
Sent: Tuesday, January 30, 2018 2:42 PM
To: Falvo, Nicholas <falvo.nicholas@epa.gov>; Kelly, Albert <kelly.albert@epa.gov>
Subject: RE: reschedule our Feb 1 meeting

Nick –

How about the afternoon of March 1? Say 1 pm?

Thanks,

Steve
Stephen P. Risotto
srisotto@americanchemistry.com
Personal Matters / Ex. 6 (voice)
(mobile)

From: Falvo, Nicholas [mailto:falvo.nicholas@epa.gov]
Sent: Monday, January 29, 2018 11:39 AM
To: Risotto, Steve; Kelly, Albert
Subject: RE: reschedule our Feb 1 meeting

Steve –
No need to apologize. February 27-March 2 is wide open. Let us know what works for you.

Thanks
Nick

From: Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
Sent: Monday, January 29, 2018 11:36 AM
To: Kelly, Albert <kelly.albert@epa.gov>
Cc: Falvo, Nicholas <falvo.nicholas@epa.gov>
Subject: reschedule our Feb 1 meeting

Mr. Kelly –

Apologies – a few of the people interested in participating in our TCE discussion are unavailable on Feb 1. Can we reschedule on Feb 27, 28, March 1 or 2?

Thank you,

Steve
Stephen P. Risotto
srisotto@americanchemistry.com
Personal Matters / Ex. 6 (voice)
(mobile)

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Message

From: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Sent: 3/21/2018 6:13:14 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
CC: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]
Subject: follow-up on TCE

Kell –

Just wanted to check if you've had a chance to debrief with the staff about our most recent discussion.

Thanks,

Steve
Stephen P. Risotto
srisotto@americanchemistry.com
Personal Matters / Ex. 6 voice)
mobile)

Message

From: Ludwiszewski, Raymond B. [RLudwiszewski@gibsondunn.com]
Sent: 10/26/2017 12:52:57 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
CC: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]
Subject: Gelman Site, Ann Arbor, MI
Attachments: 2017.06.12 - MLive - Peters discusses immigration, other issues.pdf; 2017.08.31 - MLive - Town Hall Meeting.pdf; 2017.01.18 - scott-pruitt-opening-statement-final-.pdf

Kell –

Due to his personal situation, Byron Brown asked that I reach out to you concerning a fast developing issue in Region V. I sent Bryon the below email with some background.

Recently, Congresswoman Dingell sent to MDEQ the email copied below. Altho MDEQ and the petitioners have not received a response from Region V on the Preliminary Assessment, apparently Dingell has been told the outcome of the Preliminary Assessment and that Region V has decided to assign a "dedicated staffer" to the site "regardless of the outcome of the potential Superfund listing." This is despite MDEQ having formally informed Region V in writing that the issues at the Gelman site are being adequately addressed through the ongoing state enforcement action and that federal involvement is not warranted.

I would be happy to discuss at your convenience.

Thx,

RAY

++

Dear Ms. Shirey,

Thank you for all of your dedication and hard work on the issues surrounding the dioxane plume. The plume impacts many different communities in Washtenaw County and it is essential that representatives from all levels of government, academic experts, and community advocates speak with one voice and work together to achieve a shared outcome.

As you know, several communities have petitioned EPA to conduct a preliminary assessment of the dioxane plume to see if it is eligible to be added to the National Priorities List, otherwise known as the Superfund program. In my ongoing engagement with EPA on this issue, the agency has realized the significance of the plume and has decided to dedicate a staffer to oversee the plume from the federal level regardless of what happens with the potential superfund listing. Having EPA more actively involved in the day-to-day work around the plume is welcome news for this community. A goal we all share is providing our constituents the facts and the latest scientific data in plain language and in one easily accessible place.

As a result of this action, EPA has requested to meet with all the stakeholders as they increase their engagement. To that end, this letter is to invite you to a meeting with representatives from the EPA on the morning of Monday November 13, 2017 to discuss our work on the plume and how we can all improve communications to the public on this important issue.

The exact time and location of the meeting is still being determined, but please save the morning. If you have any questions, please do not hesitate to contact me directly, or you can be in touch with my District Director Callie Bruley at Personal Matters / or callie.bruley@mail.house.gov

Sincerely,

D

Debbie Dingell
Member of Congress

Raymond B. Ludwiszewski

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W., Washington, DC 20036-5306
Tel +1 Personal • Fax +1 202.530.9562
RLudwiszewski@gibsondunn.com • www.gibsondunn.com

From: Ludwiszewski, Raymond B.
Sent: Wednesday, October 18, 2017 10:01 AM
To: 'Brown.byron@epa.gov' <Brown.byron@epa.gov>
Subject: Gelman Site, Ann Arbor, MI

Byron,

I wanted to reach out to alert you to Region V's upcoming decision concerning the Gelman Sciences 1,4-dioxane site in Ann Arbor, Michigan. As you may know, in November of last year, the Sierra Club and others petitioned EPA Region V to conduct a preliminary assessment of the Gelman site. Region V agreed to do so, promising a decision by November 2017 at the latest. Since then, as you can see from the attached news clippings, the political interest in the site and in EPA's involvement has grown.

The site is governed by a consent judgment entered by a Michigan Court and has a long remediation history built on collaboration between the responsible state agency, the MDEQ, and the PRP – Gelman – reaching back over 20 years. Recently, MDEQ formally informed Region V in writing that the issues at the Gelman site are being adequately addressed through the ongoing state enforcement action, and that federal involvement is not warranted. Gelman is in full agreement with MDEQ that the site is being effectively managed by the State, consistent with Administrator Pruitt's vision of "cooperative federalism" as expressed by his statement at his confirmation hearing.

Please let me know if you would like to meet or to discuss these issues on the phone. I appreciate your consideration. Also, if you have the opportunity, please pass my good wishes on to my friend and former colleague, David Fotouhi. I understand that you work together regularly.

Thx, RAY

Raymond B. Ludwiszewski

GIBSON DUNN

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Environmental Protection Agency Designate E. Scott Pruitt

Attorney General, State of Oklahoma

Senate Confirmation Hearing Opening Statement

January 18, 2017

Chairman Barrasso, Ranking Member Carper, members of the Committee, it is a great privilege to be here today and be considered for the position of Administrator of the Environmental Protection Agency. I want to start with what is most important to you and to the public: if I have the honor to serve as EPA Administrator, my overarching goal will be to lead in a way that our future generations inherit a better and healthier environment. It will be my absolute privilege to work with the thousands of dedicated public servants at EPA who have devoted their careers to helping realize this shared goal. I've always said that if you love what you do, you'll never work a day in your life, and I know those who work at EPA do so because of their tireless dedication to what they do.

EPA serves a critical mission. As I have repeatedly emphasized in my testimony to this body and elsewhere, promoting and protecting a strong and healthy environment is among the lifeblood priorities for the government, and EPA is vital to that mission. When I was sworn in as Oklahoma Attorney General, I was immediately confronted with an important water quality issue on the scenic Illinois River. High phosphorous levels were causing a range of environmental problems, and Oklahoma—the downstream state—had been in a long-running dispute with Arkansas over how to control those levels. It's well understood that

interstate water issues are among the most challenging in environmental law and policy. However, I worked together with my Democratic counterpart in Arkansas to reach an historic agreement to clean up that river. While this was a proud success of cooperation among the states, I also came to appreciate that if we had not solved these challenges among us, EPA would provide a vital function in ensuring the protection of the shared resources.

Environmental law, policy, and progress are all based on cooperation: cooperation between the States, cooperation between the States and EPA, and cooperation between the regulators and the public. Such cooperation is essential because clean air and water and a healthy environment are essential to the American way of life and key to our economic success and competitiveness. We should be proud of the progress we have made as a Nation in emphasizing environmental stewardship while also growing our economy. If confirmed as Administrator, I will work tireless to build on such progress in promoting a healthier environment and stronger economy for future generations by focusing on three core philosophies: rule of law, cooperative federalism, and public participation.

First, under our Constitution, the role EPA plays in protecting the environment is defined by statute, just as statutes limit every federal agency. Members of this body and of the House of Representatives have worked tirelessly over decades to set the balance in environmental policies through the laws that they have passed. The EPA's role is to administer those laws faithfully.

As Attorney General of Oklahoma, I saw examples where the Agency became dissatisfied with the tools Congress has given it to address certain issues, and bootstrapped its own powers and tools through rulemaking. This, unfortunately, has resulted only in protracted litigation, where the courts suspended most of these rules after years of delay. In the meantime, we lost the opportunity for true environmental protection as a Nation. This is not the right approach.

If given the opportunity to serve as Administrator, I will work to ensure that EPA has a cooperative and collaborative relationship with Congress in fulfilling its intent. The agency must be committed to using its expertise in environmental issues not to end run Congress, but rather to implement its direction, so that Congress may decide the proper policies for our Nation, and the EPA can go about the business of enacting effective regulations that survive legal scrutiny. The purpose of regulation is to make things regular, to put the public on clear notice of its obligations, and to do so fairly, without picking winners and losers. I look forward to working with each of you to accomplish this goal.

Second, cooperative federalism must be respected and applied by the EPA with regard to our environmental laws. Congress has wisely and appropriately directed the EPA through our environmental statutes to utilize the expertise and resources of the States to better protect the environment, and for the States to remain our nation's frontline environmental implementers and enforcers. If we truly want to advance and achieve cleaner air and water the States must be partners and not mere passive instruments of federal will. If confirmed, I will utilize the relationships I have forged with my counterparts in the States to ensure that EPA

returns to its proper role, rather than using a heavy hand to coerce the States into effectuating EPA policies.

Third, it is critical to me that EPA also truly listen to the diverse views of the American people, and learn from them. If confirmed as Administrator, I am committed to ensuring EPA's decisions are conducted through open processes that take into account the full range of views of the American people, including the economic consequences of any regulation. Environmental regulations should not occur in an economic vacuum. We can simultaneously pursue the mutual goals of environmental protection and economic growth. But that can only happen if EPA listens—listens to the views of all interested stakeholders, including the States, so that it can determine how to realize its mission while considering the pragmatic impacts of its decisions on jobs, communities, and most importantly, families.

It is, after all, EPA's core mission to protect people. It is not EPA's mission to be *against* sectors of industry in general, or against particular States. My first and primary goal as Administrator will be to return the agency to that core mission of protecting the American people through common sense and lawful regulations.

In closing, my time as Attorney General of Oklahoma afforded me the opportunity to travel my state meeting farmers, ranchers, landowners, and small business owners of all sorts. These are good people-- hardworking Americans who want to do the right thing by the environment. They want the air that their children breathe and the waters in which they swim to be clean. They *want* to follow the

law. But recently they have felt hopeless, subject to a never ending torrent of new regulations that only a lawyer can understand. They fear the EPA, and that just shouldn't be the case. If confirmed, I will work tirelessly to ensure that the EPA acts lawfully, sensibly, and with those hardworking Americans ever in mind.

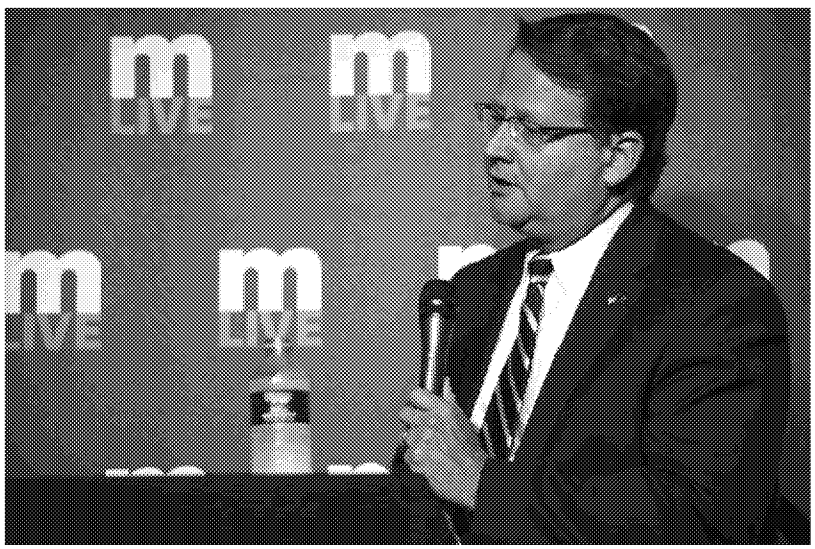
Thank you.

ANN ARBOR NEWS

Peters discusses immigration, other issues facing Ann Arbor and Michigan

Updated June 12, 2017
Posted June 12, 2017

59 Comments



An interview with U.S. Sen. Gary Peters

U.S. Sen. Gary Peters, D-Michigan, sat down with The Ann Arbor News/MLive on Friday, June 9, to talk about a wide range of issues, including everything from federal immigration enforcement to self-driving cars.

He also shared his thoughts on some Ann Arbor-specific topics, including what to do about a toxic chemical plume spreading through the area's groundwater and the city's chances of getting federal funding for a new train station in the Trump era.

He also talked about former FBI Director James Comey's recent testimony and the investigation into Russian meddling in the 2016 U.S. election.

Continue reading to hear what the senator had to say and why he thinks Michigan should be at the center of the autonomous vehicle revolution.

(Photo: Peters speaks with MLive in October 2014.)

File photo | MLive

Immigration enforcement in Ann Arbor area

Peters said he's familiar with recent immigration enforcement actions in the Ann Arbor area, including the **arrest of employees at Sava's Restaurant** by U.S. Immigration and Customs Enforcement.

"I work on these issues quite a bit," Peters said. "I'm a member of the Homeland Security Committee, so these are issues that are front and center. I do a lot of immigration work within our office, too, and actually let folks know if they have immigration issues I have two members of my staff who that's all they do basically is work on immigration issues. We just help facilitate going through the legal process. We're not immigration attorneys, but we can be helpful."

Peters said his concern is there are limited resources for enforcement and they should be focused on criminals who pose a threat.

"Those limited resources should be focused on people who we're afraid of and who are engaged in violent criminal activity or serious criminal activity, as opposed to, particularly in this case, where they just went into the kitchen, and my understanding is they were looking for somebody else who wasn't there and then they just started asking for papers," he said of the Sava's arrests.

(Photo: Sava's employees work on the line in the kitchen of the Ann Arbor restaurant after ICE agents came through on May 24, 2017.)

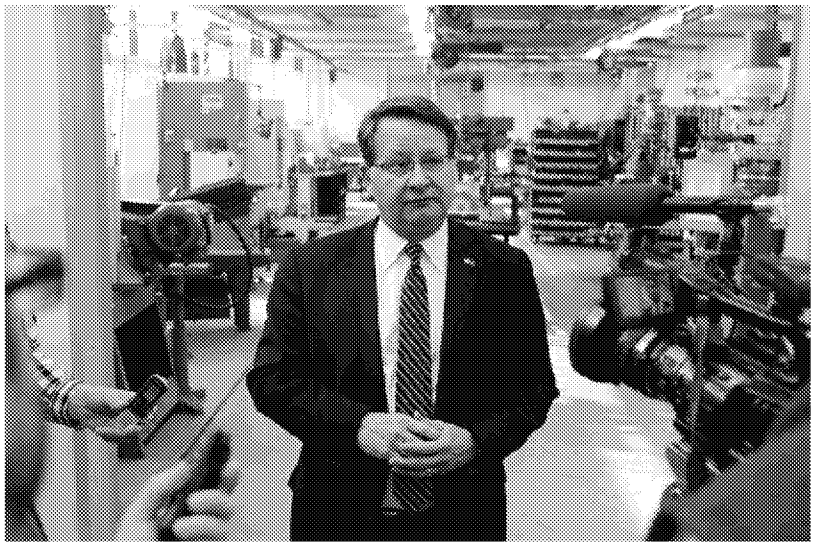
File photo | The Ann Arbor News

Cracking down on 'sanctuary cities'

Peters said there are some in Washington, including President Donald Trump, who want to see more aggressive immigration enforcement and a crackdown on **so-called "sanctuary cities" such as Ann Arbor** that aren't interested in cooperating with the feds on immigration enforcement.

He said the push to penalize those cities by proposing taking away Homeland Security grants and taking away resources and equipment for local law enforcement and first responders isn't the way to go.

"To me, Homeland Security grants should be based on the level of threat that a particular community may face from a Homeland Security perspective, not whether or not their local officials are enforcing federal immigration," he said.



Immigration reform and challenges with work visas

"Comprehensively we need to look at it," Peters said when asked what federal immigration reforms he'd like to see. "But I mean, we have have issues in just getting some work visas as well. It's a big problem in the agricultural community here in Michigan that they simply can't get the workers they need.

"Whenever I'm with an ag group, it's usually the first issue they bring up. They just want a process that people can come here and work and go back as they have, and do it in an organized way, and make sure the laws are being followed. But it's clamped down so much, they can't get people."

Peters said it's a problem particularly throughout parts of Michigan where there's a big need for seasonal workers.

"I mean, when I'm up in Traverse City in particular, it's all I hear, but it's also related to other workers, too," he said.

"I just had the folks from Mackinac Island in my office a couple weeks ago. They don't have enough people working on Mackinac and they can't find it. They work to get people down in Michigan. They do job fairs. They will bus folks up, they'll put them up in housing, all that. They still don't have enough people to work in the restaurants and the hotels ... and it's because they haven't been able to get the kind of visas that they've been able to get in the past."

(Photo: Peters speaks with reporters during a tour of Grand Valley State University's School of Engineering on Feb. 17, 2015.)

Emily Rose Bennett | MLive

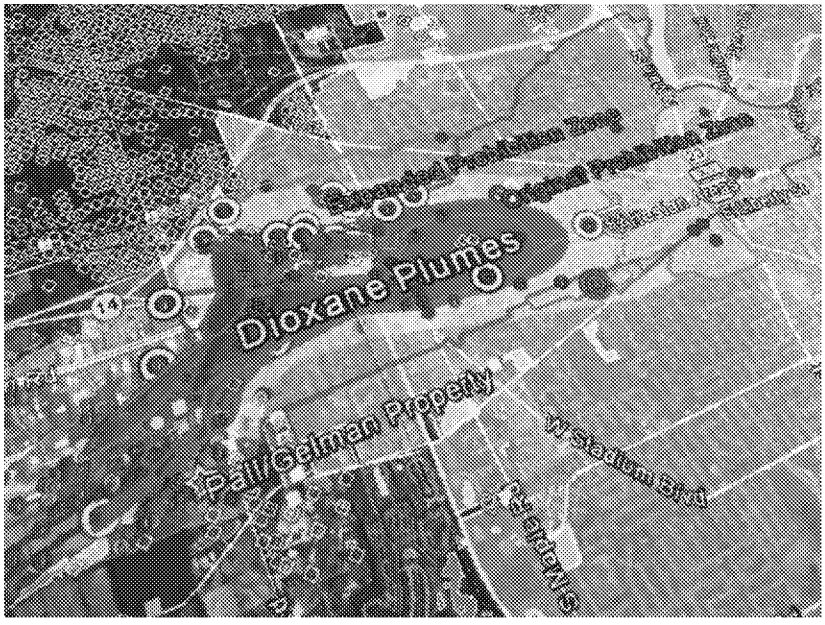
'It's becoming pretty difficult for them'

Peters said there are challenges related to H-1B visas that allows U.S. companies to temporarily employ foreign workers in speciality occupations.

He said it's creating difficulties for employers in places such as Ann Arbor that are looking for people with certain technical and engineering skills.

"It's becoming pretty difficult for them," he said. "So I think it's important that we look at some of those practical concerns."

Peters said allowing those jobs to be filled by foreign workers doesn't take away jobs from Americans. He said it just helps address shortages and ensures employers have the people they need to get the job done.



'Pretty outrageous contamination'

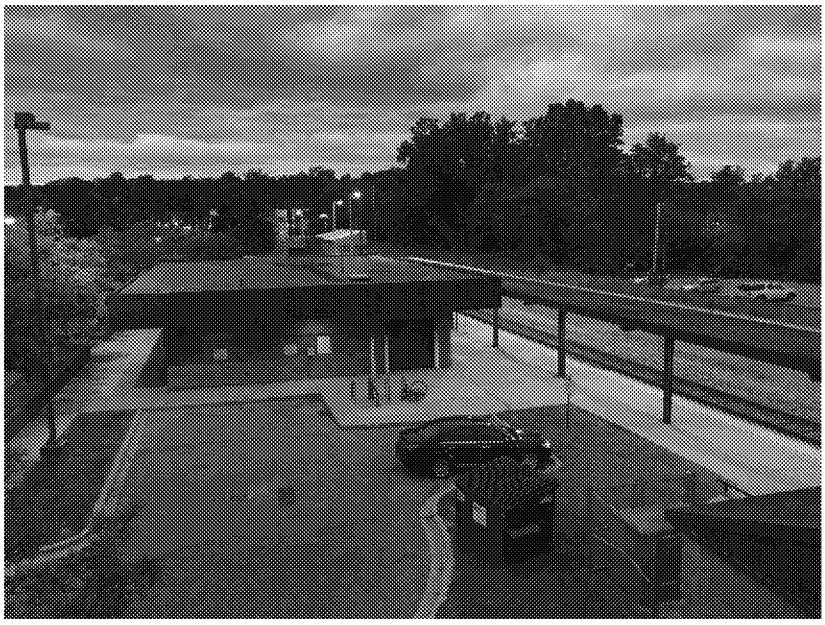
"I'd like to see that happen," Peters said of having the U.S. Environmental Protection Agency oversee a **federal Superfund cleanup** of the Gelman dioxane plume spreading through the Ann Arbor area's groundwater. "We've written letters to that effect, and my staff works regularly with community members, so it's definitely something that we're constantly working on. So hopefully they'll designate that as a Superfund site, which would be helpful."

The EPA indicated in early February it was reviewing the situation and would make a determination by November.

"I know there's a parallel track about some litigation as well, and some of the local communities want to pursue that and think that may be a quicker route, and I'd certainly encourage that route to continue to go forward because that's true," Peters said. "But, you know, this is pretty outrageous contamination that should qualify as a Superfund site and we're going to keep pressing that issue."

(Photo: A map of the Gelman dioxane plume on display at the Mayor's Green Fair in downtown Ann Arbor on June 9, 2017. The map was produced by Roger Rayle.)

Ryan Stanton | ryanstanton@mlive.com



Funding a new Amtrak station in Ann Arbor

Ann Arbor is making **plans for a new train station**, which is expected to cost tens of millions of dollars, and the city is hoping the federal government will fund most of it. Peters said it's hard to say whether that will happen in the Trump era.

"It's hard to answer that because we don't know exactly what to expect from the Trump administration," he said. "You would think that would be part of a major infrastructure package as an important piece of that. But as you're well aware, Trump talks about infrastructure — just recently he was down in Ohio talking about it, and he talked about it in his campaign — but we haven't actually seen any kind of concrete plans in terms of where those are.

"I certainly am a big booster for, I say, the Pontiac-to-Chicago line, as it starts up in Pontiac and runs through Ann Arbor. That should be one of our key infrastructure projects here for Michigan, and it's transformative. And eventually I'd love to have a high-speed rail."

(Photo: Ann Arbor's existing Amtrak station on Depot Street on June 6, 2017.)

Ryan Stanton | ryanstanton@mlive.com

High-speed rail from Chicago to Toronto

Peters said he actually would like to see high-speed rail all the way from Chicago to Toronto, stopping through Ann Arbor. He said it would be one of the most transformative infrastructure projects for the region.

He said he's been working on issues related to customs, as it would have to go across an international border.

"Having state-of-the-art stations is important," he added. "I was actually instrumental in getting funding for the Troy transit center, which is an Amtrak station, when I was the congressman representing the city of Troy, so I think it's important to have that kind of infrastructure along the line.

"We'll be working (with Ann Arbor). Any way we can be helpful to the city, we're going to be helpful to them."

Peters said there aren't earmarks anymore, so it's a whole different process now to secure funding. Though, he said, he's heard from some in Congress that earmarks could come back.

Climate change and electric, self-driving cars

Peters maintains it was irresponsible for Trump to withdraw the U.S. from the Paris climate accord.

He said that puts the U.S. in a category with two other countries that did not sign the agreement to reduce greenhouse gas emissions: Nicaragua and Syria.

"Basically Syria, which is a dysfunctional country led by a war criminal, that's who we are with on that issue," he said.

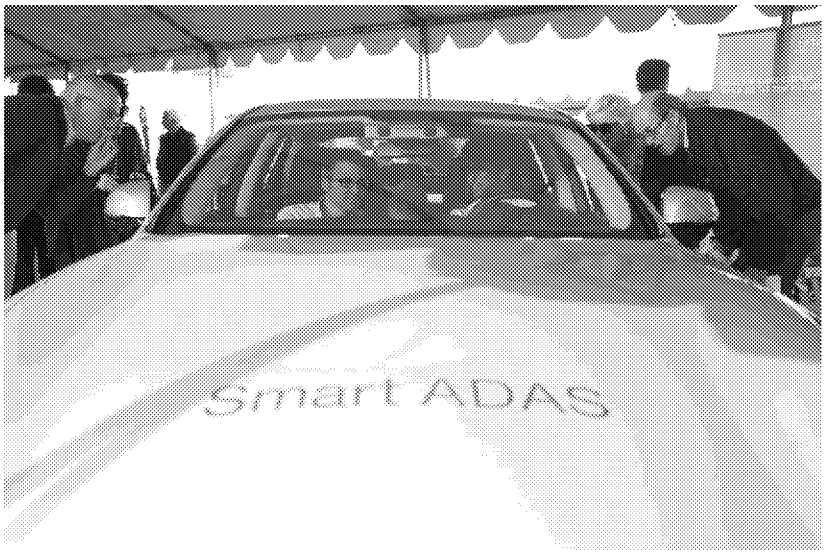
As for what Michigan can still do to reduce pollution and do its part to mitigate the effects of climate change, Peters said the state needs to move to more sustainable energy sources. He said there's already good work being done in the area of wind and solar, and a shift away from coal plants to natural gas.

"We're doing good work here in Michigan. We've got to keep doing that," he said. "But I think longterm, the thing that I'm really excited about, too, is the electrification of the automobile fleet.

"And how that's going to happen — and Michigan is going to be a key player in it — is the advent of autonomous, self-driving vehicles. And I've done a lot of work to get **Willow Run**, for example, designated as a national test facility for that."

(Photo: From left to right, U.S. Sen. Gary Peters, U.S. Sen. Debbie Stabenow, Lt. Gov. Brian Calley, Gov. Rick Snyder, President and CEO of The American Center for Mobility John Maddox and CEO of the Michigan Economic Development Corp. Steve Arwood break ground for The American Center for Mobility on Nov. 21, 2016, at the Willow Run site in Ypsilanti Township.)

File photo | The Ann Arbor News



'Michigan needs to be the center of that'

"You know, we're on the verge of the most transformative technology for autos since the first car came off of the assembly line," Peters said.

Peters said the fact that self-driving cars are ideally electric, as it's easier for computers to drive electric vehicles, is an important aspect.

"You're going to see a movement to electric separate from an environmental debate, separate from what the cost of gasoline is," he said. "It's just from a technological standpoint.

"We're going to see a transformation of the fleet with autonomous vehicles, and I believe Michigan needs to be the center of that. I think that's where Michigan will be a true leader is in transforming transportation and mobility."

Peters said he's working with Sen. John Thune, R-South Dakota, who is the chairman of the Senate Commerce Committee, on some legislation in this area, including rewriting federal regulations to accommodate self-driving vehicles without steering wheels and brake pedals.

"The human being is out of it. It's a whole new paradigm. So we are thinking that through," he said.

(Photo: Industry sponsors, including Hitachi's Smart ADAS sensor system, displayed their technology at the Mcity Test Facility open house on the University of Michigan's North Campus in Ann Arbor on May 5, 2016.)

File photo | The Ann Arbor News

ANN ARBOR NEWS

Ann Arbor's dioxane problem will be around 'for decades to come'

Comment

Updated on August 31, 2017 at 11:28 AM
Posted on August 31, 2017 at 10:47 AM

By **Ryan Stanton**, ryanstanton@mlive.com

ANN ARBOR, MI - Jim Schulz says he worked at Gelman Sciences as the director of training in the late 1970s.

"They had a system there where they were sprinkling their pollutant on the grass," he said, mentioning one of multiple ways the company discharged the toxic chemical 1,4-dioxane into the environment between the 1960s and 1980s.

"If the wind blew the wrong way, they would shut down production and have everybody go wash their car, because it would eat the paint off the car," Schulz said, speaking at a town hall meeting at the downtown Ann Arbor library Wednesday night, Aug. 30.

Schulz said workers would leave the company's Wagner Road property and go to a car wash if they got dioxane-laced effluent on their cars.

"And the people who worked there, they wouldn't drink the water. They would bring in their own water," he said.

Schulz said he only stayed at the company for about six months because he wasn't comfortable with the place.

He said his adult son now lives atop the expanding Gelman dioxane plume on Ann Arbor's west side and he's concerned about it.

"He has two small boys. They play in the grass. They play in the basement," he said. "They grow vegetables in their yard. I want to know how they can be protected from the dioxane plume."

Schulz was one of many residents who packed into the library's basement meeting room to hear an update from a mix of local and state officials, including representatives from the Michigan Department of Environmental Quality. There were more people than there were seats, and the crowd spilled out into the hallway.

The meeting was filled with tense moments as residents' frustrations boiled over. They at times shouted over the public officials who were on the panel, not allowing them to speak, demanding answers they felt they weren't getting. Residents wanted to hear a plan for cleaning up the miles-long stretch of pollution that's in the area's groundwater and threatening local drinking water supplies and homes.

Officials told residents there are ongoing confidential legal negotiations between Gelman Sciences, the DEQ, Ann Arbor, Scio Township, Washtenaw County and the Huron River Watershed Council as part of a pending case in Washtenaw County Circuit Court.

"Because we are in litigation discussions with Gelman over what that cleanup is, those discussions are confidential. As they go forward, I don't know where they're going to turn out, and we are in a precarious place and it's frustrating," said City Council Member Chuck Warpehoski, D-Ann Arbor. "I wish I could be fully transparent about where those are going, but the nature of that kind of negotiation requires that they be confidential."

Residents complained it seems as if there's now a "gag order" on keeping citizens in the loop.

U.S. Rep. Debbie Dingell, who was involved in organizing the meeting, told residents the fact that parties in the lawsuit against the polluter can't say much about the case is frustrating to her, too.

"I think I'm as pissed off as everybody else is in this room," she said at one point, sharing residents' frustrations about the continued spread of the plume.

Following a previous Circuit Court consent judgment that's in the process of being amended, Gelman Sciences has been doing pump-and-treat remediation for years to gradually remove dioxane from the area's groundwater, and the company has spent millions doing so, but some local officials and residents argue it's not enough and say they want to see the pace of cleanup accelerated.

Despite the ongoing remediation efforts, the plume is still spreading through the area's groundwater toward the Huron River, raising concerns that it could someday vent to the river in high concentrations, poison the city's water supply if it reaches Barton Pond and infiltrate people's homes in the form of toxic vapor in areas where there's shallow groundwater rising to the surface. The expanding plume already has poisoned many area wells.

Mitch Adelman, acting section manager for the DEQ's Remediation and Redevelopment Division, agreed with others Wednesday night that the problem is not going away any time soon and it would take tens of millions of dollars to do a full cleanup.

"We, the DEQ, are transparent with the community to say this problem is going to be around for decades to come," Adelman said. "That's the same thing the EPA has said."

Roger Rayle, one of the leading citizen activists pressing for a better cleanup and chairman of the local Coalition for Action on Remediation of Dioxane, agreed it's going to be an issue that outlasts him.

He cited modeling studies done by a hydrogeologist that concluded dioxane particles theoretically could travel from Wagner Road to the Huron River on average in anywhere from 74 to 351 years, with some of the fastest particles in anywhere from 4.7 to 17 years.

"I'm not going to be around in 74 years, let alone 351 years, so we have to set up the regulatory agencies to be ready for this for the life of the cleanup," Rayle said, raising concerns that there are mistakes and gaps in data that leave some uncertainties.

"Sometime in the life of the cleanup, uncertainties should be minimized," he said. "Dioxane might not vaporize into people's homes at dangerous levels, but to know that we need proactive ongoing sampling to assure this, not just whenever they feel like it. Dioxane may not spread to township wells north as it goes to Barton Pond, but to know that we need to fill in the monitoring gaps."

Adelman said Gelman Sciences is pumping and treating about 500 gallons of contaminated groundwater per minute, while it used to do much more and is permitted to go up to 1,300 gallons per minute.

"They have ratcheted that down. We understand the frustration," he said.

Adelman pointed to the 2004 court decision by now-retired Judge Donald Shelton that allows the plume to spread to the river through a court-ordered zone where groundwater use is prohibited. He said that's the framework the DEQ is working under now, so the focus is on making sure people are not exposed to unsafe levels of dioxane.

"We care very much about it. We've been working hard to make sure that's the case," he said of making sure people have clean water.

Separate from the ongoing lawsuit that local officials hope will lead to a new consent judgment with a better cleanup strategy, Dingell noted the U.S. Environmental Protection Agency is still reviewing the Gelman dioxane plume as a potential Superfund cleanup site.

"And I don't want to give people false hope on Superfund," she said, arguing the program isn't being funded enough.

"And even if it were to be designated as a Superfund site, the Department of Environmental Quality will tell you this, it's a very long process, which like everything else these days seems to be broken. Having said that, the preliminary investigation is going on."

Adelman offered an update on the DEQ's efforts to finalize new exposure standards for dioxane in drinking water. The DEQ issued an emergency rule last year to lower the the state's acceptable level of dioxane in drinking water from 85 parts per billion to 7.2 ppb, and Adelman said there are ongoing efforts to more formally establish that as the standard through a non-emergency rule.

Just a few parts per billion in drinking water, with long-term exposure, poses a 1 in 100,000 cancer risk, according to the EPA.

Dioxane is classified by the EPA as likely to be carcinogenic to humans by all routes of exposure. It also can cause kidney and liver damage, and respiratory problems. Short-term exposure to high levels of dioxane in the air can cause eye, nose and throat irritation.

Adelman said the DEQ began hearing concerns that the state's 85-ppb standard was outdated after new EPA data about dioxane came out in 2010, suggesting a single-digit standard was more appropriate.

The DEQ, under Gov. Rick Snyder's administration, was required by law to revise the state's chemical exposure standards by December 2013 to reflect the latest scientific findings. But after years of repeated delays and missed deadlines, that still hasn't happened and the state is still trying to finalize new standards for 300-plus hazardous substances, including dioxane, which only has a stricter standard in place right now because of a temporary emergency rule.

"It took the state, I will admit, too long to get that changed," Adelman said of going from 85 ppb to 7.2 ppb.

Adelman said the DEQ thought it would have a comprehensive rule package for all 300-plus hazardous substances ready by this April when the dioxane emergency rules were set to expire.

"For numerous reasons beyond DEQ's control, we weren't able to make that happen, so a decision was made again by the department and the governor to extend the emergency rule for the drinking water criterion in April of this year, so we've still got the 7.2 ppb enforceable criterion," he said, adding Gelman has been voluntarily working with the DEQ to make sure nobody is drinking dioxane-contaminated water with concentrations above 7.2 ppb.

After missing its earlier April goal, Adelman said the DEQ hoped to have a comprehensive rule package for dioxane and 300-plus other hazardous substances done by October of this year, but he doesn't think that's going to happen now, either.

As a result of the continued delays, he said, the DEQ has decided to promulgate a new rule for dioxane with just the 7.2-ppb drinking water standard to make it official, and he thinks that can be done before the temporary emergency rule expires at the end of October.

Immediately thereafter, he said, the DEQ wants to get moving on the comprehensive rule package for the 300-plus hazardous substances, which will include other exposure standards for dioxane.

The DEQ is still planning to propose a new 1,900-ppb screening level for vapor intrusion. There isn't any vapor-intrusion screen level now, though there was one set at 29 ppb under the emergency rules issued by the DEQ last October. Adelman said there's new information to suggest 1,900 ppb is a more appropriate threshold.

Ann Arbor resident Jeff Hayner urged city officials to start setting aside money to address the threats posed by the Gelman plume, saying clean water is more important than some of the other things on which the city spends money.

State Rep. Adam Zemke, D-Ann Arbor, said he's willing as a taxpayer to pay for addressing the Gelman plume, but he also thinks it's important to try to fight to make the polluter pay for an adequate cleanup, and he said that's what's being done now.

"The stars are as best aligned as they ever have been to ensure that we have a polluter-pay plan, and that's something I think everybody wants," Zemke said.

"Your local elected officials, your state elected officials, are on the same page with you," state Rep. Yousef Rabhi, D-Ann Arbor, assured residents. "We want to make sure that this gets cleaned up."

Rabhi, who is proposing a polluter-pay law in Michigan, said it was amazing to see the number of residents who came out Wednesday night.

"I love the energy in this room," he said after some of the more passionate outbursts of frustration.

Rabhi said Gelman's polluting of local groundwater aquifers never should have happened and local elected officials are not going to be happy until it gets cleaned up as best as possible.

"One of those local strategies is legal, because we got pretty much screwed last time around by a judge who decided that he was going to side with the company and give the company most of what they wanted," he said. "And that was partially because the DEQ was the only one in the room, and the city and the county and others were excluded from that litigation."

Message

From: John Hammen [john.hammen@metalsus.com]
Sent: 4/18/2018 4:31:38 PM
To: Duaime, Ted [TDuaime@mtech.edu]
CC: Mark Thompson [MThompson@montanaresources.com]; Dreed@mt.gov; Chapin Storrar [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=user608fc9ab]; Greene, Nikia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=32a08a414a4f40199b557c0819eb7d0b-Greene, Nikia]; Tim Hilmo - BP (Tim.Hilmo@bp.com) [Tim.Hilmo@bp.com]; Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: Re: New Tech for Cleaning up the Berkeley Pit

Thanks, Ted! I will give you a phone call to follow up.

On Wed, Apr 18, 2018 at 8:47 AM, Duaime, Ted < **Redacted** wrote:

John:

Attached are the water quality results from last Novembers Berkeley Pit sampling event. Results of this springs sampling are not yet available, however, I will be happy to provide those once they are complete. As you will notice both dissolved and total recoverable fractions were analyzed.

The State of MT has stipulated that any large quantities of water collected and shipped from the Berkeley Pit can only be sent to a lab/entity that has an EPA Hazardous Waste ID number, this number is obtained through the state where the lab/test facility etc. is usually located. Once you provide that ID number to me we can then discuss the quantity of water necessary for your testing and the best shipping method. Below is the language from our current Sampling and Analysis Plan (MBMG 2017):

Collection of Bulk Water Samples for Treatability Studies

The MBMG periodically receives requests for the collection of bulk Berkeley Pit water samples for treatability studies from vendors and researchers. The MBMG performs this work as part of the 2002 CD monitoring/sampling program under the guidance of EPA and DEQ. The MBMG collects and ships quantities up to 20 gallons at no cost to the requestor; special arrangements are necessary for larger quantities to cover personnel and shipping costs. Per requirements of the DEQ-Hazardous Waste Program (RCRA), the requestor must provide the appropriate EPA Hazardous Waste ID number for the receiving facility that will be performing the treatability test. No Berkeley Pit bulk water samples will be collected or shipped without the proper EPA ID number.

Feel free to contact me directly to discuss either the water quality data or bulk water sample needs; I can be reached by phone at 406-496-4157. The MBMG provided 5 gallons of pit surface water to your father, Dr. Richard Hammen,

Chromatochem, in 1994 (?). I believe I visited with him when he came to Tech a short time later to talk about his metals recovery process a short time later. I don't have any record of providing more recent water samples or data to your company, so you will notice some changes in the pit chemistry (i.e. iron, copper, and pH) since then.

Thanks,

Ted

TED DUAIME
Hydrogeologist
MBMG
Montana Bureau of Mines and Geology
OFFICE PHONE (406) 496-4157

From: John Hammen <john.hammen@metalsus.com>
Sent: Wednesday, April 18, 2018 12:30 AM
To: Mark Thompson <MThompson@montanaresources.com>
Cc: Dreed@mt.gov; Chapin Storrar <storrarcs@cdmsmith.com>; Greene, Nikia <Greene.Nikia@epa.gov>; Tim Hilmo - BP (Tim.Hilmo@bp.com) <Tim.Hilmo@bp.com>; Duaime, Ted <Redacted>; kelly.albert@epa.gov
Subject: Re: New Tech for Cleaning up the Berkeley Pit

Mr. Thompson,

We look forward to working with you to advance the best solution for the Butte community and state of Montana. The Metals US team, and other friends and partners of ours, have invested significant time and interest in understanding the Berkeley Pit situation, chemistry, and possible solutions because we are concerned about the ongoing and possibly escalating impact of the site. We believe our technology could be the missing link that could enable a best possible outcome for everyone, and we feel it is our responsibility as citizens to do what we can to help out. On that basis, we have put together a preliminary plan that I think is feasible, and we would like to engage in a straightforward process to see if it is the right answer. Since every application and solution is different, any advance projections of costs and values is an approximation, no matter how established or well used a technology may be. No doubt you have had to refine your process and therefore costs and economics for the current precipitation process over the course of your ongoing development work.

We work with a number of Fortune 500 companies to provide solutions to problems otherwise difficult to address with conventional technologies. Initial modeling may be done with established rubrics to see if the costs are within the range of feasibility. We have done this with the Berkeley Pit with our internal costing models, and the results are reflected in the document provided. However, since providing very detailed modeling and costing for complicated projects like the Berkeley Pit can take many months of time cost up to hundreds of thousands of dollars in engineering cost and assessment, serious clients generally prefer to first establish that the technology can in fact meet water treatment goals, at least at smaller scale, through basic test work. This provides direct results with the target solution which not only proves technical feasibility, but also provides a framework for more accurate projections. We have always found our clients to be quite willing to provide us solutions for testing, and support our efforts to demonstrate the efficacy of our technology to provide them more options for solving their problem. That is a win/win for everyone.

Our ability to provide real demonstration of not only the effectiveness of the technology, but use those results to justify compelling economics, sets us apart from nearly all of our competition, and I imagine most of the technology providers you have spoken to. We have not contacted any potential purchasers of the zinc metal product. It seems a bit premature to do so, given that we do not yet have zinc production at the Pit, nor do we have a request to build a facility, nor do we even yet, it seems, have a willingness from you to provide small water samples. However, given the fact that zinc is one of the most traded and sought after commodities in the modern metals market, I do not expect surprises as regards either salability or price.

I know that Montana Resources, and other collaborating parties, have worked tirelessly to provide the Best Available Technology solution or the Berkeley Pit, and other environmental impact issues in the area. We are concerned, as I know you are, that any water discharged from the Pit meet or beat all regulatory standards, and, if possible, the water level on the Pit be drawn down so that it does not provide an ongoing threat of seepage into the surrounding water, soil, and air. I think these goals are very obtainable! We appreciate your team's deep pool of knowledge and experience with treating the Pit, and look forward to engaging you in a process that is clear, straightforward, and transparent to determine if Solid Phase Extraction may be the BAT for at least some aspects of the water processing and solids management.

You mentioned that you and the MBMG have developed protocols for evaluating new proposals and emerging technologies. Could you provide me this written documentation, so that I can better understand your process? Also, if Mr Duaime could provide the most recent analyses from the Pit, that would be most helpful. Thank you for your assistance! Also, our team would look forward to meeting in the near future with your team to further discuss our collaboration. Best Regards,

-John

On Thu, Apr 12, 2018 at 4:14 PM, Mark Thompson <MThompson@montanaresources.com> wrote:

> Mr. Hammen,
>
> As you would expect, we receive numerous proposals to "mine" and/or treat the Berkeley Pit water. With the assistance of the Montana Bureau of Mines and Geology (MBMG), we have developed protocols to evaluate new proposals and emerging technologies. Please contact Mr. Ted Duaime at the MBMG and request the latest sampling results from the B. Pit to ensure that you are working with the most recent water quality information. Then with more detail than the proposal provide to Mr. Greene, explain your recovery and treatment train using the latest WQ results and provide detailed cost analysis. If you propose to offset treatment costs with recovered metal value, please describe in detail the form that the metal is recovered (e.g. elemental Zn, ZnS, ZnO, etc.) and a description of where

and how it is marketable. Ultimately we will need written commitment from purchasers of the metals to ensure that the produced products are in fact marketable. Your proposal states that your technology has previously been demonstrated to treat B. Pit water. Could you provide this information? You also state that your technology is in production at other locations. Could you provide references?

The appropriate stakeholders will review these detailed proposals and other information. Assuming that the detailed proposals demonstrate technical merit, we will require that the technology be tested off site at bench scale. Under certain conditions, Mr. Duaime can provide the water for testing. If bench testing is successful, we may allow pilot testing on site at your expense.

Thank you for your interest.

Mark

Mark Thompson

Vice President of Environmental Affairs

Montana Resources, LLP

600 Shields Ave.

Butte, Montana 59701

Phone: (406) 496-3211

Cell: **Personal Matters / Ex. 6**

Montana Resources

From: Greene, Nikia [mailto:Greene.Nikia@epa.gov]
Sent: Thursday, April 12, 2018 10:08 AM
To: Mark Thompson; Tim Hilmo - BP (Tim.Hilmo@bp.com)
Cc: Dreed@mt.gov; Chapin Storrar
Subject: FW: New Tech for Cleaning up the Berkeley Pit

Mark and Tim,

Mr. Hammen caught me after the ROCC/CTEC meeting yesterday and I explained that if MR and AR were interested EPA is interested. So, could you take a look at this and let me know if you are interested in pursuing this technology further or why you would not be.

Thanks,

Nikia Greene

Remedial Project Manager

U.S. EPA, Region 8

(406)-457-5019

greene.nikia@epa.gov

From: John Hammen [mailto:john.hammen@metalsus.com]
Sent: Wednesday, April 11, 2018 7:26 PM
To: Greene, Nikia <Greene.Nikia@epa.gov>
Subject: New Tech for Cleaning up the Berkeley Pit

Dear Nikia:

It was a pleasure to touch bases with you today at the forum about our new technology for remediation of the Pit and surrounding areas. Let me say I admire the balance, compassion, and fortitude you bring to managing this very challenging project, while at the same time working with and bringing along the understandably frustrated Butte community. We have developed the core basis for our Solid Phase Extraction Technology (SPE) - the key part of our remediation strategy, over a few decades, and spent the last several years bringing it to commercialization. Our long vision has been to develop a technology foundation that enables us to help with projects that really have large impact on people and communities. While we have many projects with good profit margins, we have always been particularly interested in the Berkeley Pit because of its significance to Montana and the whole nation. I also believe our experience not only in technology development, but also process testing and implementation, enables us to put together a "whole package" from the science fundamentals to the facility, operations, and big picture impact that most technology imagineers lack. Our Total Metal Recovery/Zero Discharge methodology was developed because it both provides the most economic way to operate the plant, and also is the only way to provide a clean water output without large waste byproducts. I have attached our white paper on the Berkeley Pit, and I hope you find this embodied in the document. It is our hope that we can work with you and others in the EPA, the Butte community, and other related parties, to provide a solution that realizes the best possible environmental and human impact outcome, while also being economically viable and sustainable in the long run. I appreciate any thoughts you may have, and look forward to working together as things advance. With Best Regards,

-John

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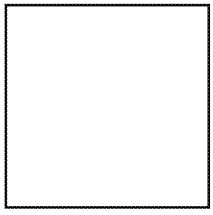
John Hammen | Chief Executive Officer



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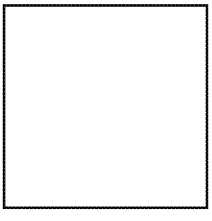
John Hammen | Chief Executive Officer



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John Hammen | Chief Executive Officer

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Message

From: Genovese, Robert (BP) [Robert.Genovese@bp.com]
Sent: 4/27/2018 9:49:11 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: Atlantic Richfield's petition to US Supreme Court in Christian v. Atlantic Richfield
Attachments: 17-_PetitionForAWritOfCertiorari.pdf

Kell,

I hope that you are doing well.

I have attached a copy of Atlantic Richfield's petition for a writ of certiorari filed today with the US Supreme Court for the *Christian v. Atlantic Richfield* litigation. Amicus briefs will be submitted by the end of May. All briefs will be filed by the end of July. The Court will consider the petition when it returns in September.

This litigation could have substantial impacts on the implementation of Superfund remedies, the EPA's authority under CERCLA, and the protections provided to cooperating PRPs through the consent decree process.

Let me know if I can provide any further information as I know that this case is of significant importance to the EPA.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone **Personal Matters /**

No. 17-

IN THE

Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

GREGORY A. CHRISTIAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a divided decision that conflicts with decisions of federal courts of appeals nationwide, the Supreme Court of Montana held that landowners can pursue common-law claims for "restoration" requiring environmental cleanups at Superfund sites that directly conflict with EPA-ordered cleanups at these sites. The Montana court reached that result for one of the largest, oldest, and most expensive Superfund sites in the country, the Anaconda Smelter site. The court ignored EPA's views that the Superfund statute—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—barred the restoration claims and that plaintiffs' preferred remedies would *hurt* the environment. The state court's holding throws remediation efforts at Anaconda and other massive sites into chaos and opens the door for thousands of private individuals to select and impose their own remedies at CERCLA sites at a potential cost of many millions of dollars per site.

The questions presented are:

1. Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a "challenge" to EPA's cleanup jurisdictionally barred by § 113 of CERCLA.

2. Whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup.

3. Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

PARTIES TO THE PROCEEDING

Petitioner, who was petitioner below and defendant in the trial court, is Atlantic Richfield Company. Atlantic Richfield is a wholly owned subsidiary of BP America Inc., which is a wholly owned subsidiary of BP America Limited. BP America Limited is a wholly owned subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a wholly owned subsidiary of BP p.l.c., which is a publicly held company. Neither Atlantic Richfield Company nor any of its direct or indirect parent companies other than BP p.l.c, is publicly held.

Respondents, who were counter-petitioners below and plaintiffs in the trial court, are Gregory A. Christian; Michelle D. Christian; Rosemary Choquette; Duane N. Colwell; Shirley A. Colwell; Franklin J. Cooney; Vicki Cooney; George Coward; Shirley Coward; Jack E. Datres; Sheila Dorscher; Viola Duffy, Bruce Duxbury; Joyce Duxbury; Bill Field; Chris Field; Andrew Gress and Frank Gress as Co-Personal Representatives of the Estate of James Gress; Charles Gustafson; Michael Hendrickson; Patrice Hoolahan; Shaun Hoolahan; Ed Jones, Ruth Jones; Barbara Kelsey; Myrtle Koepplin; Brenda Krattiger; Doug Krattiger; Julie Latray; Leonard Mann; Valerie Mann; Kristy McKay; Russ McKay, Bryce Meyer; Mildred Meyer; Judy Minnehan; Ted Minnehan; Diane Morse; Richard Morse; Karen Mulcahy; Patrick Mulcahy; Nancy Myers; Serge Myers; Leslie Nelson; Ron Nelson; Jane Newell; John Newell; George Niland; Laurie Niland; David Ostrom; Rose Ann Ostrom; Judy Peters; Tammy Peters; Robert Phillips; Toni Phillips; Carol Powers; William D. Powers; Gary Raasakka; Malissa Raasakka; Alex Reid; Kent Reisenauer; Peter Reisenauer; Sue Reisenauer; Larry Rupp; John A. Rusinski; Kathryn Rusiski; Emily

Russ; Scott Russ; Carl Ryan; Penny Ryan; Rich Salle; Diane Salle; Dale Schafer; David D. Schlosser; Ilona M. Schlosser; Michael Sevalstad; Jim Shafford; Rosemarie Silzly; Anthony Solan; Kevin Sorum; Don Sparks; Vickie Spehar; Zane Spehar; Cara Svendsen; Caron Svendsen; James H. Svendsen, Sr.; James Svendsen, Jr.; Doug Violette; Ester Violette; Carol Walrod; Charles Walrod; Darlene Willey; Ken Yates; Sharon Yates; Linda Eggen as Personal Representative of the Estate of William Yelsa and as Guardian of Maurine Yelsa; David Zimmer; and Toni Zimmer.

Respondent Montana Second Judicial District Court, Silver Bow County, the Honorable Katherine M. Bidegaray, was the nominal respondent below.

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PPL Mont., LLC v. Montana,
565 U.S. 576 (2012).....36

Cases—Continued Page(s)

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Schalk v. Reilly,
900 F.2d 1091 (7th Cir. 1990) 17

United States v. Akzo Coatings of Am., Inc.,
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United States v. Atl. Research Corp.,
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United States v. Bestfoods,
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United States v. City & Cty. of Denver,
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§ 9601(20)(A) 5, 26
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Other Authorities

132 Cong. Rec. 28,430 (1986) 27

Black's Law Dictionary (5th ed. 1979) 24

EPA, *Anaconda Co. Smelter: Reports and Documents* 7

EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision* (1998) 8

EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision Amendment* (2011) 7, 8

EPA, *Community Soils Operable Unit Record of Decision* (1996) 7, 8

EPA, *Fifth Five-Year Review Report: Anaconda Smelter Superfund Site* (2015) 8, 9

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EPA, *Fourth Five-Year Review Report for Silver Bow Creek / Butte Area Superfund Site* (2016) 8

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EPA, *Superfund Sites in Region 8* 34

EPA, *Superfund Sites Targeted for Immediate, Intense Action* (last updated Apr. 16, 2018) 9

Other Authorities—Continued Page(s)

GAO, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements* (2009) 35, 36

C.B. Glasscock, *The War of the Copper Kings* (1935)..... 6

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Michael P. Malone et al., *Montana: A History of Two Centuries* (rev. ed. 1991)..... 6

Laurie Mercier, *Anaconda: Labor, Community, and Culture in Montana's Smelter City* (2001)..... 6

Kathie R. Miller, *Attorneys Discuss Possibility of Lawsuit Against ARCo for Anaconda Residents*, Anaconda Leader, Jan. 24, 2018 35

Katherine N. Probst, *Superfund 2017: Cleanup Accomplishments and the Challenges Ahead* (2017)..... 35

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OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 408 P.3d 515 (Mont. 2017) and reproduced at App. 1a. The opinion of the trial court is unpublished but reproduced at App. 41a.

JURISDICTION

The Supreme Court of Montana issued its opinion and entered judgment on December 29, 2017. App. 1a. On February 20, 2018, Justice Kennedy extended the time to file a petition for certiorari until April 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613(h), 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 [in five enumerated exceptions].

Section 122(e)(6) of CERCLA, 42 U.S.C. § 9622(e)(6), provides:

> 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 feasibil-

> ity 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.

Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

This is one of the most consequential decisions interpreting CERCLA in years. While CERCLA encourages public participation in EPA's selection of a remedy at "Superfund" sites, once EPA selects the remedy, CERCLA establishes multiple protections against interference with EPA's plans. *First*, § 113(h) jurisdictionally bars "challenges" to EPA remedies that do not fit within statutory exceptions. 42 U.S.C. § 9613(h). *Second*, § 122(e)(6) bars anyone affiliated with a Superfund site—a "potentially responsible party," innocent or otherwise—from undertaking remedial actions absent EPA's approval. *Id.* § 9622(e)(6). *Third*, under the Supremacy Clause, CERCLA preempts state-law claims that interfere with EPA's remedial plans.

Petitioner Atlantic Richfield has worked with EPA for *35 years* to remediate Montana's Anaconda Smelter Superfund site, at a cost of approximately $470 million. But the Montana Supreme Court, over a strong dissent, held that private landowners may

bring state-law "restoration" claims to require companies to pay for remedies directly at odds with EPA's chosen remedy. The court held that neither § 113(h), § 122(e)(6), nor preemption principles bar restoration claims. In the court's view, "a jury of twelve Montanans" could second-guess the EPA-selected remedies and order implementation of a different remedy. App. 13a. The court remarkably ignored the views of the United States on the interpretation of § 113(h), § 122(e)(6), and preemption. App. 63a-65a. Worse still, the court did not even acknowledge the United States' warning that plaintiffs' proposed remedies seriously threatened to *damage* the environment. App. 73a-74a.

The decision below creates splits on what kind of lawsuit constitutes a "challenge" barred by § 113(h), on who qualifies as a "potentially responsible party" barred from conducting unilateral, non-EPA-approved cleanups under § 122(e)(6), and on whether ordinary principles of conflict preemption apply under CERCLA.

This Court should grant review because the holdings below are simultaneously so wrong and so consequential. The issue whether a state-law claim "challenges" a CERCLA remedy arises frequently in the context of long-term and expensive CERCLA cleanups, as does the definition of a "potentially responsible party." No court has adopted as constricted a view of these provisions as the Montana Supreme Court. And no court has held, as the Montana Supreme Court did, that conflict preemption does not apply in the CERCLA context. This lawsuit would have come out differently had it been filed in federal court in Montana, subject to Ninth Circuit precedent.

Left uncorrected, the decision will create confusion, delay, and immense cost at the Anaconda Smelter site, undermining 35 years of efforts by Atlantic Richfield and EPA. The decision threatens to force Atlantic Richfield to pay tens of millions of dollars to remove soil that EPA determined there was no reason to remove. Plaintiffs' restoration plan requires digging trenches EPA thinks should *not* be dug, erecting barriers EPA thinks should *not* be built, and inserting enzymes into the groundwater that EPA has represented could *endanger* human health. In other words, EPA will have spent the last 35 years, and will spend the next seven years, remediating one of the largest and most complex Superfund sites in the Nation just so the plaintiffs can bulldoze it and start all over again. This is the very definition of madness.

The decision below also provides a roadmap for courts around the country to subvert the finality and efficiency that are CERCLA's principal goals. But the decision's immediate impact at Anaconda and the 16 other Superfund sites across Montana alone warrants this Court's review given the sheer size and scope of these sites. The decision invites thousands of unforeseen plaintiffs-landowners to sue companies to implement expensive and contradictory remedies at each site. The decision permits juries to order "restoration" remedies affecting tens of thousands of people even where EPA concludes those remedies would *harm* the environment. The decision permits countless landowners to undertake remedial efforts on their own without consulting EPA. And the decision threatens the integrity of every future CERCLA settlement EPA enters.

Certiorari is warranted.

A. Statutory Background

CERCLA promotes the "timely cleanup of hazardous waste sites." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). The Act grants EPA "broad power to command government agencies and private parties to clean up [the sites]." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). EPA may undertake remedial action on its own, or compel responsible parties to undertake remedial actions under the agency's supervision. *See* 42 U.S.C. §§ 9604(a), 9606(a), 9607(a)(4)(A); *Bestfoods*, 524 U.S. at 55.

CERCLA contains two key provisions that prevent interference with EPA-ordered remedial actions. First, CERCLA § 113(h), except in circumstances not relevant here, jurisdictionally bars any "challenges" to EPA cleanups. 42 U.S.C. § 9613(h). Section 113 thus "protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (emphasis omitted).

Second, CERCLA § 122(e)(6) provides that "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by" EPA. 42 U.S.C. § 9622(e)(6). A "potentially responsible party" includes the "owner" of "any site or area where a hazardous substance has ... come to be located." 42 U.S.C. §§ 9607(a)(1)-(2), 9601(9), 9601(20)(A). The phrase is accordingly "broad" and extends to even those landowners "not responsible for contamination." *United States v. Atl. Research Corp.*, 551 U.S. 128, 134 n.2, 136 (2007).

B. Factual Background

Petitioner Atlantic Richfield is the largest landowner at the Anaconda Smelter site, one of the country's oldest and largest Superfund sites. The site itself is massive: it stretches across 300 square miles of residential, commercial, recreational, and agricultural lands in western Montana. Over 9,000 people live within the site's borders. U.S. Census Bureau, *QuickFacts: Anaconda-Deer Lodge County, Montana*, goo.gl/aqJhCD.

From 1884 until 1980, the site was home to one of the world's largest copper smelters. Fueled by Montana's seemingly boundless natural resources, Anaconda employed thousands of workers and produced a massive portion of the world's copper supply, wiring America's homes and cities, powering Montana's economy, and dominating state politics for almost a century.[1]

Over the last 35 years, Atlantic Richfield, the successor to the company that operated the Anaconda Smelter site, has worked with EPA to remediate environmental damage there. EPA designated the site as a Superfund site in 1983, shortly after CERCLA's enactment. At EPA's direction, Atlantic Richfield undertook extensive, expensive, and years-long investigations at the site to assess the extent of the environmental damage. Two targets of the remediation are relevant here—arsenic and lead contamination in certain residential yards and pastures, and

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[1] Michael P. Malone et al., *Montana: A History of Two Centuries* 229-31, 324-27 (rev. ed. 1991); Laurie Mercier, *Anaconda: Labor, Community, and Culture in Montana's Smelter City* 21-30 (2001); *see also* C.B. Glasscock, *The War of the Copper Kings* (1935).

groundwater contamination throughout the site. Through voluminous "Records of Decision," EPA selected remedies for those units in the 1990s and has continued to update them.[2]

EPA developed the Records of Decision over the course of decades. These remedial orders total more than 1,300 pages and consist of detailed soil and water reports, topographical surveys, scientific analyses, and countless charts, tables, and graphs supporting EPA's decisions. The Records of Decision order Atlantic Richfield to remove and replace up to 18 inches of soil in yards with arsenic levels above 250 parts per million (ppm) and treat water with arsenic levels above 10 parts per billion (ppb). EPA, *Community Soils Operable Unit Record of Decision* (CS ROD) §§ 4.0, 9.1 (1996), goo.gl/FJ5VRc; EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision Amendment* (ARWWS ROD Amend.) § 3.1 (2011), goo.gl/gj1CZ3.

EPA determined that, due to hydrologic and geochemical conditions, targeting groundwater arsenic levels of 10 ppb was technically impracticable. ARWWS ROD Amend. § 6.4.4.1. As an alternative, EPA implemented source-control measures, together with domestic-well monitoring and replacement to protect human health and the environment. *Id.* § 6.4.5. EPA painstakingly considered—and rejected—a host of alternative remedies. *E.g.*, CS ROD §§ 7.0, 8.0.

Members of the community, including residents, participated in EPA's multi-year decisionmaking process. EPA conducted notice-and-comment periods,

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[2] *See* EPA, *Anaconda Co. Smelter: Reports and Documents*, goo.gl/pJ2rQL.

public meetings, and extensive outreach to citizens' groups and state and local governments. *E.g.*, CS ROD Responsiveness Summary § 1.0; EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision* (ARWWS ROD) Responsiveness Summary § 1.0 (1998), goo.gl/GG8aQC. EPA offered lengthy responses to public comments and questions. For example, after one plaintiff in this action objected that EPA's 250 ppm arsenic standard was too high, EPA responded that the standard was "based on site-specific toxicological testing" and that arsenic levels below 250 ppm "do not present a risk to residents." ARWWS ROD Amend. Responsiveness Summary § 6.0.C. Since issuing the Records of Decision, EPA has continued to solicit and respond to the views of the community, and several plaintiffs have participated in EPA's five-year site reviews.[3]

For its part, Atlantic Richfield has spent approximately $470 million implementing EPA's orders. The company has remediated more than 340 residential properties and more than 11,500 acres of undeveloped land.[4] And the company has already returned significant portions of the site to productivity, including a world-class golf course designed by Jack Nicklaus, and a wildlife area managed cooperatively with the State.[5]

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[3] *E.g.*, EPA, *Fourth Five-Year Review Report: Anaconda Smelter National Priority List Site* § 4 tbl.4-1 (2010), goo.gl/7g4RRk; EPA, *Fifth Five-Year Review Report: Anaconda Smelter Superfund Site* § 5.2 tbl.5-1 (2015), goo.gl/7RLczh.

[4] *Fifth Five-Year Review*, *supra* note 3, at ES-1.

[5] *Id.* §§ 8.2.1, 10.1, 10.4; ARWWS ROD Responsiveness Summary § 1.2; *see also* EPA, *Fourth Five-Year Review Report for Silver Bow Creek/Butte Area Superfund Site* § 3.2 (2016), goo.gl/xCnT9e.

Significant work remains. In 2017, EPA identified the Anaconda Smelter site as one of 22 Superfund sites, out of 1184 nationwide, "targeted for immediate, intense action" because Anaconda "requir[es] timely resolution of specific issues to expedite cleanup and redevelopment efforts."[6] EPA projects a construction completion date of approximately 2025, followed by monitoring and maintenance work. Atlantic Richfield and EPA anticipate that, by 2025, the company will have cleaned up an additional 1,150 residential yards, revegetated 7,000 acres of upland soil, and removed tens of millions of cubic yards of hazardous smelting waste. App. 62a; *Fifth Five-Year Review*, *supra* note 3, at tbls.10-1, 10-7.

C. Proceedings Below

In 2008, landowners within the Anaconda Superfund site sued Atlantic Richfield in Montana state court, alleging that their properties were damaged by pollution from the Smelter's operation between 1884 and 1980. Atlantic Richfield raised no CERCLA objections to four out of the five types of damages plaintiffs sought, namely, loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort.

But Atlantic Richfield objected to plaintiffs' common law claim for "restoration" damages. Plaintiffs do not dispute, and the court below held, that to establish a claim for restoration damages in Montana, plaintiffs must prove that they will actually use the award for restoration, *i.e.*, cleaning up the site. App. 5a, 11a; App. 24a n.1 (McKinnon, J., dissenting).

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[6] EPA, *Superfund Sites Targeted for Immediate, Intense Action* (last updated Apr. 16, 2018), goo.gl/YKa6EN; EPA, *Superfund: National Priorities List (NPL)*, goo.gl/ZFjAx1.

As the court explained, plaintiffs here allege that restoration of their property requires "work in excess of what the EPA required of [Atlantic Richfield] in its selected remedy." App. 4a. Specifically, plaintiffs want to lower the arsenic level in the soil to 8 ppm, *i.e.*, 31 times lower than EPA's level of 250 ppm. App. 72a. Plaintiffs also demand removal of 24 inches of topsoil, at least 33% more than the maximum of 18 inches EPA thinks necessary. *Id.* And plaintiffs demand the construction of 19,000 feet of underground trenches and barriers to change water chemistry flows, even though EPA has determined that *any* trenches and barriers threaten to worsen environmental conditions by creating risks of surface and ground water contamination. *Id.* at 72a-74a.

Atlantic Richfield moved for summary judgment, arguing that the restoration claim constituted a "challenge" to EPA's remedy, and was thus jurisdictionally barred by CERCLA § 113. Atlantic Richfield also argued that because landowners are always "potentially responsible parties," or PRPs, CERCLA § 122(e)(6) barred plaintiffs from pursuing restoration damages without EPA authorization, which they lacked. Finally, Atlantic Richfield argued that CERCLA in all events preempted plaintiffs' restoration claim.

The United States tried to enter the case at the state trial-court level, contending that the court lacked jurisdiction "to consider Plaintiffs' restoration damages claim, because [CERCLA] expressly prohibits challenges to ongoing CERCLA response actions." U.S. Motion for Leave to File Amicus Brief ¶ 1, Dist. Ct. Dkt. 429. The court did not permit the government to file a brief and separately held that CERCLA permitted plaintiffs' restoration-damages claim. Dist. Ct. Dkt. 442; App. 42a-55a. Atlantic Richfield

sought a writ of supervisory control—available only when "urgency or emergency factors exist making the normal appeal process inadequate," Mont. R. App. P. 14(3)—which the Montana Supreme Court granted. App. 3a.

In an amicus brief to the Montana Supreme Court, the United States argued that the trial court misinterpreted § 113 and § 122(e)(6) and should have found the restoration claim preempted. App. 63a-65a. The United States explained that this claim would "undermine EPA's ability to implement its own remedy." App. 71a-75a. The government contended that restoration claims would "discourage the type of final settlements that Congress sought to foster in enacting CERCLA," because "[p]arties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations." App. 71a.

The government also explained that plaintiffs' remedies risked damaging the environment. App. 72a-75a. And it explained that the relief plaintiffs sought constituted "the type of uncoordinated response that CERCLA ... was designed to prevent," App. 78a, and would cause "delay of EPA's cleanup efforts contrary to Congress's intent," App. 75a. In short, the United States stated that CERCLA "does not allow the landowners to use their state-court lawsuit to supplement EPA's selected response-action cleanup levels." *Id.*

Over a dissent, the Supreme Court of Montana rejected all three of the company's and the United States' arguments. The court affirmed the trial court's decision permitting plaintiffs to proceed to a jury trial on their restoration claim. App. 18a.

First, the court held that the claim did not constitute a "challenge" barred by § 113(h). The court did not dispute that plaintiffs sought restoration work that conflicted with the work underway at the site. The court nonetheless held that a state tort remedy that specifies a cleanup different than that selected by EPA is not a "challenge" unless it "would stop, delay, or change the work EPA is doing." App. 11a. The court stated that "any restoration will be performed by the Property Owners themselves and will not seek to force the EPA to do, or refrain from doing, anything at the Site." App. 13a. The court stated that the plaintiffs 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.*

Second, the court held that § 122(e)(6)'s prohibition on unauthorized remedial actions by PRPs did not bar relief, because plaintiffs were not PRPs. App. 16a-17a. The court reasoned that it was too late to identify the plaintiffs as PRPs: "[T]hey have never been treated as PRPs" since the property was designated as a Superfund site, and thus "the PRP horse left the barn decades ago." App. 16a. The court further reasoned that the lack of a prior judicial or agency finding that the plaintiffs are responsible parties exempted them from the statutory consequences of PRP status. App. 16a-17a. The court accordingly regarded it as irrelevant that EPA would not authorize—and indeed vigorously opposed—the work contemplated by plaintiffs' remedy.

Third, the court concluded that CERCLA did not preempt plaintiffs' claims. App. 17a-18a. The court held that savings clauses in CERCLA §§ 114(a) and 152(d), 42 U.S.C. §§ 9614(a), 9652(d), categorically preserve plaintiffs' ability to bring any state-law res-

toration claims, even those that specifically conflict with CERCLA or an EPA-selected remedy. *Id.*

Justice McKinnon dissented, explaining that the restoration claim constituted a challenge barred under § 113. Justice McKinnon observed that plaintiffs' restoration plan, "which includes digging an 8,000-foot trench for a groundwater wall and removing 650,000 tons of soil over a period of years, would conflict with the ongoing EPA investigation and CERCLA cleanup." App. 23a-24a. She noted that "the undisputed evidence shows the EPA rejected the soil and groundwater remedies proposed by [plaintiffs] during the course of the EPA's regulatory deliberations at the Smelter Site." App. 39a.[7]

Justice McKinnon found the majority's interpretation of § 113 "inconsistent with CERCLA and federal precedent." App. 24a. "Given the substantial weight of authority" interpreting § 113(h) to bar claims like those made by plaintiffs, she declared herself "at a loss to understand how this Court can suggest, without any authority, that we 'simply' allow 'a jury of twelve Montanans' to 'assess the merits of [plaintiffs'] plan.'" App. 35a.

REASONS THE PETITION SHOULD BE GRANTED

The decision below permits state tort suits to obstruct complex and costly CERCLA cleanups undertaken at EPA's direction. The court reached this result by ignoring clear federal-law obstacles, not to mention the position of the relevant expert federal agency. Certiorari is warranted for three reasons.

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[7] The majority and dissent below focused on plaintiffs' plans to dig an 8,000-foot trench. Plaintiffs also propose to dig 11,000 feet of other trenches, for a total of 19,000 feet. Pls.' Supp. Expert Witness Discl. at 4, Dist. Ct. Dkt. 574 (R. at APP-0905).

First, the decision below splits with decisions interpreting CERCLA by multiple federal courts of appeals, including the court of appeals covering Montana. The three questions presented are squarely presented and outcome-determinative. *Second*, the decision is wrong, and it disregards CERCLA's plain text and purpose of avoiding costly litigation and expediting cleanups. *Third*, the questions presented address important and recurring issues that should be resolved by this Court.

The decision of the Montana Supreme Court upends decades of remediation and delicate negotiation and cooperation among numerous stakeholders over how best to clean up one of the country's oldest and largest Superfund sites. Companies will not willingly enter into settlements and consent decrees with EPA to conduct remediation at a Superfund site if they are simultaneously subject to state-law tort suits that require diametrically different remediation steps. The decision below is a case in point: it exposes Atlantic Richfield to sudden and unexpected liabilities in the tens of millions of dollars. This is so even though plaintiffs' proposed remedy would be wasteful in the extreme, requiring Atlantic Richfield to pay to undo the remedies EPA ordered it to undertake. In other words, not only does the decision frustrate a cleanup that is currently proceeding under federal law, it means that much of the last 35 years of work and the next seven years of work by EPA would be for naught.

The decision also invites thousands more landowners across the State to sue to supplant EPA's remedy or to implement remedial efforts themselves without EPA's authorization. And the decision provides a roadmap for other states to bless similar theories of recovery that run roughshod over CERCLA's

calibrated scheme. Given the sheer number of CERCLA sites in Montana, their great size and complex cleanup efforts, and the many millions of dollars and thousands of hours that EPA, parties at the sites, and the surrounding communities have invested in remediation over decades, the decision plainly warrants this Court's review.

I. The Montana Supreme Court's Interpretation of CERCLA Conflicts with Decisions of Other Courts

A. The Decision Conflicts with Other Courts Regarding What Constitutes a "Challenge" Under § 113(h)

The Montana Supreme Court held that "fundamentally, 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." App. 11a. The court deemed it irrelevant that plaintiffs' proposed cleanup conflicted with the clean-up that EPA ordered and that is currently underway. *Id.* The court failed even to acknowledge EPA's view that the proposed remedy would undermine its decades-long efforts and could even worsen environmental conditions and risks to human health. App. 71a-75a. All that mattered to the state court was that plaintiffs' remedy could be implemented by the owners themselves *after* Atlantic Richfield finished the EPA-ordered cleanup, so that EPA would not need to itself "alter" its own plan. App. 13a. The court's interpretation of the statutory term "challenge" conflicts with the decisions of six other federal courts of appeals.

1. Start with the Ninth Circuit, where Montana sits. In the Ninth Circuit, "[a]n action constitutes a challenge to a CERCLA cleanup if it is related to the goals of the cleanup." *ARCO Envtl. Remediation,*

L.L.C. v. Dep't of Health & Envtl. Quality of Mont., 213 F.3d 1108, 1115 (9th Cir. 2000) (quotation marks omitted). The Ninth Circuit has thus held that § 113(h) bars any situation "where the EPA works out a plan, and a ... suit seeks to improve on the CERCLA cleanup because it wants more." *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011) (quotation marks omitted); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995). "[D]isputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in progress." *McClellan*, 47 F.3d at 329 (internal quotation omitted).

The state court's construction of § 113(h) was outcome-determinative. Plaintiffs' claim for restoration damages would have been barred under the Ninth Circuit's interpretation of § 113(h). Put simply, "EPA work[ed] out a plan," and plaintiffs "want[] more." *Pakootas*, 646 F.3d at 1220. Neither the court below nor the plaintiffs dispute that the restoration claims seeks a different remedy than the one EPA selected. Nor could they. As EPA concluded, "aspects of [the plaintiffs'] plans are a dramatic departure from EPA's ROD requirements." App. 72a. EPA explained that plaintiffs would "apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA"; would "excavat[e] to two feet [of topsoil] rather than EPA's chosen depth of 18 inches within residential areas"; would "transport[] the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA"; and would "construct[] a series of underground trenches and barriers for capturing and treating shallow groundwater." *Id.* The dissent below, applying the Ninth Circuit's test, thus concluded that plaintiffs' "restoration plan ... would

conflict with the ongoing EPA investigation and CERCLA cleanup," and consequently is barred as a "challenge" under § 113(h). App. 23a-24a.

Like the Ninth Circuit, the Third, Seventh, Tenth, Eleventh, and D.C. Circuits have held that a challenge under § 113(h) encompasses any suit that "calls into question" or "impacts" EPA's ordered cleanup. Thus, the Third Circuit holds that § 113(h) bars suits contesting "what measures actually are necessary to clean-up the site and remove the hazard." *Boarhead Corp. v. Erickson*, 923 F. 2d 1011, 1019 (3rd Cir. 1991). The Seventh and D.C. Circuits hold that § 113(h) bars any suit that would "impact the remedial action selected." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 880 (D.C. Cir. 2014); *Pollack v. U.S. Dep't of Def.*, 507 F.3d 522, 526-27 (7th Cir. 2007); *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990). The Tenth and Eleventh Circuits hold that no suit may be brought that "calls into question" EPA's chosen remedy. *Cannon v. Gates*, 538 F.3d 1328, 1335 (10th Cir. 2008); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006); *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002).

These circuits have adopted broad functional tests for determining what constitutes a "challenge" under § 113(h). Their tests do not depend on who is implementing the remedy or whether the terms of the EPA order would change. Rather, these courts focus on what is happening at the site. In contrast, the Montana Supreme Court adopted a counterintuitive and highly formalistic test, requiring the plaintiffs' remedy actually to alter the terms of the EPA order or to force EPA to implement those changed terms.

2. The court below found the circuit precedents "inapposite" because they purportedly did not involve claims by "private property owners, against another private party, seeking money damages for the purpose of restoring their own private property." App. 12a. That is incorrect. The Ninth Circuit has explained that the "prohibitory language of Section 113(h) does not distinguish between plaintiffs," *McClellan*, 47 F.3d at 328, and applied its interpretation to preclude suits between two private parties seeking money damages, *Pakootas*, 646 F.3d at 1214. Moreover, the Tenth Circuit barred a common-law tort suit by New Mexico against a private party, expressly rejecting the notion that § 113(h)'s prohibitions exempted suits for "money damages." *New Mexico*, 467 F.3d at 1249-50. The Tenth Circuit concluded that § 113(h) does not permit private parties to be "held liable for monetary damages because they are complying with an EPA-ordered remedy which [they] have no power to alter without prior EPA approval." *Id.*

The court below thus relied on a distinction without a difference. While *some* of the cases involve suits against EPA rather than against private parties, none of them suggested that the question mattered, and the circuits to consider a suit for money damages against a private party hold that § 113(h) applies. Plaintiffs' challenge to EPA's cleanup remedy obviously "impacts" and "calls into question" EPA's remedy, *i.e.*, the controlling standard in the Ninth and all the other circuits. Plaintiffs' restoration claims are a brazen assault on EPA's remedial efforts that no other court would permit.

B. The Decision Conflicts with Other Courts Regarding Who Is a "Potentially Responsible Party" Barred from Non-EPA-Authorized Cleanups

The decision below creates a second split on who is a "potentially responsible party," or "PRP," barred under CERCLA § 122(e)(6) from conducting unilateral cleanups at Superfund sites without EPA's approval.

Once EPA orders or initiates remedial activity at a Superfund site, § 122(e)(6) bars any "potentially responsible party" from "undertak[ing] any remedial action" that EPA has not specifically "authorized." 42 U.S.C. § 9622(e)(6). CERCLA defines a PRP broadly to include any "owner or operator" of property within a Superfund site, without the need for any designation or prior determination. 42 U.S.C. § 9607(a)(1); *see Atl. Research Corp.*, 551 U.S. at 131-32. Section 122(e)(6) naturally applies to all landowners, because site owners or operators are the entities most likely to undertake unauthorized remedial actions. The Montana Supreme Court's holding that plaintiffs are not PRPs, App. 15a-17a, conflicts with the view of the United States and the uniform consensus of every federal court of appeals to have addressed the question. As the United States told the court below, any current property owner is automatically a PRP, regardless of whether they were "somehow 'declared PRPs'" and "regardless of whether they have defenses that could absolve them of liability." App. 79a-80a. Because plaintiffs are property owners at the Superfund site, they are PRPs, full stop. *Id.*

Likewise, the courts of appeals agree that PRP status under CERCLA occurs solely by reference to the party's relationship to a hazardous waste site;

fault is irrelevant. Plaintiffs would be considered PRPs at least in the Second, Third, Seventh, and Ninth Circuits. The Ninth Circuit has explained, for example, that any owner of property at the time of the cleanup is a PRP. *Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 914-16 (9th Cir. 2010). The Seventh Circuit has held that a landowner was a "PRP for CERCLA purposes ... based solely on its ownership of the [hazardous waste] site." *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1239-42 (7th Cir. 1997). The Second Circuit likewise held that multiple "property owners" were PRPs simply by dint of their ownership status, "regardless of whether or not they deposited [hazardous waste]." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010). As the Third Circuit has explained, "in the case of a current operator ... [one] is not even required to show that the [PRP] was an operator when an active 'disposal' of hazardous waste occurred." *Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 381 (3d Cir. 2013).

The Montana Supreme Court did not disagree that plaintiffs are owners under the plain terms of § 9607(a)(1). The court rather "decline[d]" to "treat the [plaintiffs] as PRPs" because the remediation had been occurring for many years and plaintiffs had not previously been "designated" as PRPs by a court or EPA. App. 16a-17a. But the federal appellate decisions just cited reject this extra-statutory exception. The Seventh Circuit held that a current owner was a PRP in 1997 even though it was "not a party that is now or ever has been subject to a civil action under CERCLA" or "any administrative cleanup order from the ... EPA," and though CERCLA remediation had been occurring since 1982. *Rumpke*, 107 F.3d at

1239. The Second Circuit recognized parties as PRPs 18 years after remediation began, even though they had never been previously "designated" as PRPs by the courts or EPA. *Niagara Mohawk*, 596 F.3d at 118, 135-36. Likewise, the Third Circuit held that former owners of a polluted parcel in New Jersey were PRPs more than 15 years after cleanup efforts began, and despite the lack of a prior "designation." *Litgo*, 725 F.3d at 375-76, 379-85.

As far as Atlantic Richfield is aware, no court besides the one below has ever suggested that landowners can conduct remediation efforts at Superfund sites without EPA approval. No other court has engrafted onto the statute exemptions from PRP status akin to those the Montana Supreme Court invented here. The holding was outcome determinative and constitutes a radical departure from an established consensus among the circuits. The decision now gives a green light to unilateral remediation by landowners even during an ongoing EPA-ordered cleanup.

C. The Decision Conflicts with Other Courts Regarding the Application of Conflict Preemption to CERCLA

The decision below creates yet a third split, on the applicability of conflict preemption in the CERCLA context. This is a classic case of conflict preemption: the remedy plaintiffs seek conflicts with the CERCLA cleanup that EPA has ordered. The United States accordingly argued that allowing the claim for restoration damages to proceed triggers impossibility preemption principles and would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Con-

gress." App. 77a (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Federal courts of appeals have recognized that CERCLA preempts state environmental laws, including common-law remedies, where they deprive EPA of the "flexibility needed to address site-specific problems," *United States v. City & Cty. of Denver*, 100 F.3d 1509, 1512-13 (10th Cir. 1996), "dramatically restrict[] the range of options available to the EPA," *id.*, conflict with the terms of an EPA consent decree, *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1458 (6th Cir. 1991), or would "create a path around the statutory settlement scheme," *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997).

At least three circuits, including the Ninth, hold that ordinary conflict preemption applies "notwithstanding [CERCLA's] savings clauses." *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 952 n.26 (9th Cir. 2002). Discussing 42 U.S.C. §§ 9614(a) and 9652(d), the Ninth Circuit explained that those clauses "make it clear that CERCLA does not preempt the *field* of hazardous waste cleanup," but do not save state laws that "come[] into conflict with CERCLA." *Fireman's Fund*, 302 F.3d at 952 n.26. The Ninth Circuit then held that various local laws were preempted. *Id.* at 943, 949, 952. The Tenth Circuit holds that "conflict preemption" is "an affirmative defense available to [CERCLA defendants] notwithstanding" §§ 9614(a) and 9652(d). *New Mexico*, 467 F.3d at 1244. Likewise, the Seventh Circuit holds that § 9652(d) "merely ... nix[es] an inference that [CERCLA] is intended to be the exclusive remedy," but does not "allow specific provisions of [CERCLA] to be nullified." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). "CERCLA's

savings clause must not be used to gut provisions of CERCLA." *Id.*

In direct conflict with these decisions, the court below held that CERCLA's savings clauses categorically save all state common-law claims from preemption, no matter how much the remedy sought conflicts with EPA's orders. App. 17a-18a. The court accordingly did not even engage in the conflict preemption analysis. *Id.* This Court should grant certiorari to resolve the split with the Seventh, Ninth, and Tenth Circuits. Moreover, the conflict preemption question—and the extent to which the savings clauses negate preemption—is inextricably intertwined with the statutory questions presented, and granting on all three issues would give this Court the greatest flexibility in resolving this case.

* * *

This case is an ideal vehicle to address all three questions. All three questions are squarely presented and outcome determinative; resolving any one of them in Atlantic Richfield's favor would require the dismissal of plaintiffs' restoration claims. Moreover, as the sheer number of cases cited above demonstrates, the decision below raises important and recurring questions concerning one of the most consequential federal environmental statutes. Especially troubling, the Montana Supreme Court split on all three questions presented with the Ninth Circuit, which includes Montana. Plaintiffs in Montana now have every incentive to forum shop. Only this Court can restore uniformity, both within Montana and nationally.

II. The Decision Is Wrong

The Montana Supreme Court's decision is inconsistent with CERCLA's text, structure, and design. The United States agrees. Taken together, the court's three holdings eviscerate the statutory and constitutional protections that prevent interference with EPA-ordered cleanups.

1. Section 113 jurisdictionally bars restoration claims, whether filed in state or federal court, because such claims directly challenge EPA's selected remedy. Section 113(b) gives federal courts "exclusive original jurisdiction over all controversies arising under [CERCLA]." 42 U.S.C. § 9613(b). Section 113(h), in turn, bars federal courts from reviewing "any challenges" to EPA's chosen remedy. 42 U.S.C. § 9613(h) ("No Federal court shall have jurisdiction ... to review any challenges" to any EPA removal or remedial action). The court below (App. 9a) noted in passing § 113(h)'s reference to federal courts, but as the Ninth Circuit has long held, §§ 113(b) and (h), when read together, "deprive the Montana state court[s] of jurisdiction" over any claim that "constitute[s] a challenge to a CERCLA cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115; *accord Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999). For this reason, the United States has concluded that "state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim." App. 67a n.2.

Plaintiffs' restoration claim is a quintessential "challenge" to EPA's remedial orders under § 113(h). To "challenge" is "to object or except to; ... to call or put in question; to put into dispute; to render doubtful." Black's Law Dictionary 209 (5th ed. 1979). As

the United States argued below and multiple circuits hold, any state-law claim that impacts EPA's remedy at a CERCLA site constitutes an impermissible "challenge." *Supra* pp. 15-16. This Court has repeatedly held that CERCLA's terms should be afforded their ordinary meaning. *See Burlington*, 556 U.S. at 610-11; *Bestfoods*, 524 U.S. at 66.

The Montana Supreme Court's contrary holding disregards § 113(h)'s plain text. Plaintiffs seek to dig up soil that EPA wants in the ground. App. 72a; App. 36a-37a (McKinnon, J., dissenting). The United States described plaintiffs' plans as a "dramatic departure from EPA's" plans. App. 72a. If plaintiffs' restoration claim does not "object" to or "put in question" EPA's remedy, nothing does.

The court below held that § 113(h) did not apply because the remedy could be implemented after EPA's cleanup was conducted, but offered no textual or other basis for creating such an exception. A challenge is a challenge. And as for the court's observation that plaintiffs rather than EPA would implement the restoration, App. 12a, the statute bars "*any* challenges." 42 U.S.C. § 9613(h) (emphasis added). The statute's protections would be flimsy indeed if litigants could simply sue to force EPA's private-sector partner to fund a private effort to undo EPA's work. Moreover, this suit implicates all of the policies that undergird § 113. EPA can hardly superintend complex cleanups at sites across the country while juries second-guess the agency's judgment at every turn.

2. The court's interpretation of § 122(e)(6) was equally erroneous, as the United States agrees. Plaintiffs are barred from bringing their claims because they are "potentially responsible part[ies]" and

their proposed "remedial action has [not] been authorized by" EPA. 42 U.S.C. § 9622(e)(6). Plaintiffs never sought EPA approval, and the United States has stated it is "unlikely to approve the cleanup proposed by the [plaintiffs] because that approach is inconsistent with EPA's." App. 79a.

The court's holding that plaintiffs were not PRPs was wrong. CERCLA defines PRPs to include, as relevant, the "owner" of "any site or area where a hazardous substance has ... come to be located." 42 U.S.C. §§ 9607(a)(1)-(2), 9601(9), 9601(20)(A). The Anaconda Smelter Superfund site is indisputably such a site. And it does not matter whether plaintiffs themselves contributed to the hazard. *Atl. Research Corp.*, 551 U.S. at 136. The term "PRP" in CERCLA includes "everyone who is *potentially* responsible for hazardous-waste contamination," *Bestfoods*, 524 U.S. at 56 n.1 (emphasis added), regardless of defenses they may have to any ultimate liability. The term serves many statutory functions other than assigning liability—here, defining a category of persons who are barred from conducting EPA-unauthorized remediation.

The court "decline[d]" to treat as PRPs owners who met the statutory terms but had not been previously "designat[ed]" as PRPs by EPA or a court in one of three ways. App. 15a-17a. But no such exemption or prior "designation" requirement appears in the text or in any of the cases the court cited, and the language of § 122(e)(6) and § 107(a)(1) is not discretionary.

Nor is there any "horse left the barn" exception to PRP status, App. 16a, as the absence of any citation in the decision below demonstrates. The court below pointed to the statute of limitations on private

suits *against* PRPs for recovery of cleanup costs, *id.*, but § 122(e)(6) bars remedial action *by* PRPs without EPA authorization. CERCLA imposes no statute of limitations on that prohibition, nor would such a limitation make sense. And the fact that Atlantic Richfield and EPA did not seek contribution from plaintiffs or otherwise treat them as PRPs until plaintiffs filed this lawsuit, App. 16a, is irrelevant. Their PRP status only became relevant because of this lawsuit. That plaintiffs were never asked to contribute financially to the remediation in the past does not mean they should be allowed to *undermine* it now.

The Montana Supreme Court's cramped reading of the term PRP would drain § 122(e)(6) of its central purpose. Section 122(e)(6) is designed "to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." 132 Cong. Rec. 28,430 (1986) (statement of Sen. Mitchell). And the type of PRP most plausibly positioned to do such a thing is, of course, current property owners, the very category the Montana court excised by judicial fiat.

The consequences of the court's holding extend well beyond allowing restoration-damage claims. This holding allows any property owner on any of Montana's 17 Superfund sites to immediately start digging trenches, removing soil, and treating contamination—on their own. Congress obviously did not intend to allow landowners to bring in their own bulldozers smack in the middle of EPA-ordered cleanups.

3. Plaintiffs' remedy is preempted under ordinary implied-conflict-preemption principles, which include both impossibility and obstacle preemption. *See Ari-*

zona v. United States, 567 U.S. 387, 398-99 (2012). This is a paradigmatic case. The United States has determined that plaintiffs' restoration plan "conflict[s] with EPA's" remedial plan and "could make [EPA's] remedies difficult or impossible to achieve." App. 78a.

First, compliance with plaintiffs' restoration damages remedy and the mandates of CERCLA is an "impossibility." *Arizona*, 567 U.S. at 399. Plaintiffs' restoration plan directly contradicts EPA's plan. The government articulated four examples: arsenic action levels for treatment (250 versus 8 ppm); depth of soil removal (18 versus 24 inches); location of soil removal (local versus hundreds of miles away); and construction of underground barriers that change groundwater chemistry and flow (none versus thousands of feet). App. 72a, 74a. Nor is it relevant that plaintiffs would implement their conflicting remedies after EPA and Atlantic Richfield "pull up stakes." App. 14a. Plaintiffs can prevail under state law only by persuading a jury that the cleanup EPA ordered was insufficient. Conversely, the only way Atlantic Richfield could avoid liability is by conducting a cleanup that would place the company in flagrant violation of EPA's orders.

Second, plaintiffs' claim "stands as an obstacle to the accomplishment and execution" of CERCLA's purposes. *Arizona*, 567 U.S. at 399. Again as the United States urged, App. 77a-78a, granting a restoration-damages remedy would usurp EPA's exclusive statutory authority to select and implement the appropriate remedy, *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994); 42 U.S.C. §§ 9604, 9617, and would thwart CERCLA's central objectives of promoting settlement and preventing multiple, conflicting remedies at a Superfund site.

The court below essentially ignored the government's carefully considered views. The court observed that the government stated at oral argument that "some" unidentified "aspects" of plaintiffs' plan would not constitute a "challenge." App. 14a. But the court ignored the government's repeated, strenuous representations during argument and throughout its brief that multiple aspects of plaintiffs' plan *would* directly conflict with EPA's remediation. App. 71a-80a. Instead, the court concluded that CERCLA's savings clauses, 42 U.S.C. §§ 9614(a), 9652(d), precluded conflict preemption as a matter of law.

That was wrong. This Court has "repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (quotation marks omitted). A "saving clause" does "*not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869; *accord Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001). That is why multiple circuits have held, in line with the ordinary rule, that CERCLA's savings clauses rule out field but not conflict preemption. *Supra* pp. 22-23. CERCLA's savings clauses preserve state-law causes of action that complement CERCLA, and indeed, Atlantic Richfield conceded that CERCLA did not preempt four out of five types of damages claimed in this case. But where, as here, a common-law restoration remedy would "gut [other] provisions of CERCLA," *PMC, Inc.*, 151 F.3d at 618, it is preempted.

III. The Questions Presented Are Immensely Important

The decision below clearly conflicts with decisions of the Ninth Circuit and other federal appellate courts and would merit review for that reason alone. But the decision also strips away CERCLA's central protections against interference with EPA-ordered remedies, invites damage to the environment, upsets longstanding and massive reliance interests, and threatens to impose immense costs on private companies that for decades have been working side by side with EPA to remediate the nation's most hazardous waste sites.

1. A decision that threatens to frustrate a federal agency's implementation of an important federal scheme warrants this Court's review. Congress enacted CERCLA to "promote the timely cleanup of hazardous waste sites," *Burlington*, 556 U.S. at 602 (quotations omitted), to centralize decisionmaking in expert agencies like EPA, *Akzo Coatings*, 949 F.2d at 1423-24, and to promote finality by "encourag[ing] settlement," *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The United States told the court below that plaintiffs' restoration claims frustrate each of those objectives. App. 77a-78a. A decision so cavalierly ignoring the views of the government warrants this Court's review.

Sections 113(h) and 122(e)(6) play a crucial role in protecting EPA-ordered remedial action from interference and delay. "The limits § 113(h) imposes on a district court's jurisdiction are an integral part of [CERCLA's] overall goal," *Boarhead*, 923 F.2d at 1019, and § 122(e)(6) is part of "the cornerstone of [the modern CERCLA] settlement process," *Allied*

Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1109 (N.D. Ill. 1988).

The Montana Supreme Court opened up massive loopholes in both provisions, while simultaneously holding that ordinary principles of conflict preemption do not apply under CERCLA. Montana's outlier decision turns Superfund cleanups into free-for-alls, where different groups of landowners not only may ask juries to decide for themselves whether EPA's remedy suffices, but also may begin conducting their own remediations without consulting EPA. The decision thus permits multiple, conflicting, uncoordinated cleanups at the behest of thousands of individual landowners across hundreds of miles of Montana Superfund sites.

Beyond that, absent this Court's intervention, the Montana Supreme Court's decision will undermine the ability of EPA and companies to remediate Superfund sites. In many cases, companies have entered into comprehensive and costly remedy-defining consent decrees with EPA that took years to negotiate, involving remedies that take years to implement. The United States put it bluntly: "The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations." App. 71a. The decision thus "discourage[s] the type of final settlements that Congress sought to foster in enacting CERCLA." *Id.*

Atlantic Richfield's history in Montana is illustrative. Atlantic Richfield has worked cooperatively with EPA at Montana Superfund sites for over 35 years, complying with dozens of EPA requests to im-

plement interim and final remedial actions, and entering into six consent decrees to fund and implement EPA's selected remedies in the Upper Clark Fork River Basin Superfund area. The company's primary incentive to enter into agreements like these—certainty and finality—would be lost if the Montana Supreme Court's decision is allowed to stand.

2. The decision below also seriously threatens the environment. It is not just that plaintiffs' plans would "divert cleanup resources from the implementation of EPA's plan." App. 72a-73a. At every stage of the administrative and judicial proceedings, EPA has rejected plaintiffs' plans as infeasible and downright dangerous. In EPA's expert view, for example, plaintiffs' proposed 8,000-foot-long underground barrier and the various shorter barriers "could change the groundwater flow in unpredictable ways," and could "unintentionally contaminate groundwater and surface water." App. 74a. EPA expressly rejected very similar proposals. App. 62a-63a. Likewise, plaintiffs propose to "[t]ear[] up" soil that EPA ordered capped and backfilled, which "could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion." App. 72a-73a. "Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public." App. 73a. As EPA explained, "Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids ad hoc addition of potentially competing cleanup measures." App. 74a.

But under the holding below, newly empowered plaintiffs may substitute their own plans for EPA's remedy or tear up work that has already been com-

pleted, even if those plans are environmentally counterproductive. And they can do all this without so much as a heads-up to EPA. The question whether federal law permits private citizens to impose their own remedial judgment in a way that EPA says will risk environmental damage clearly merits this Court's review. Over 9,000 people live within the Anaconda site's borders and will face the consequences of environmental damage wrought by ill-advised remediation steps that conflict with those ordered by EPA.

3. The costs of this decision for Atlantic Richfield would be substantial and unexpected, and this Court's intervention is necessary to provide meaningful relief. This Court regularly grants certiorari in cases where a lower court has frustrated the petitioner's longstanding reliance on agency rules or settled practice. *E.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). As noted, Atlantic Richfield has cooperated with EPA for 35 years and has already spent approximately $470 million remediating the site. This progress has been possible because Atlantic Richfield and EPA have relied on the finality and durability of the records of decision and other administrative orders that govern cleanup work at the site. That reliance will be frustrated if the Montana Supreme Court's decision is allowed to stand. And Atlantic Richfield, a company working in good faith with EPA, could be required to pay many millions of dollars undoing that same work. *See* Pls.' Supp. Expert Witness Discl., *supra* note 7, at 4-5 (plaintiffs' expert estimating a cost of between $50 million and $57.6 million to "restore" about 70 residential properties).

4. The consequences of the decision below extend far beyond this case, far beyond the Anaconda Smelter site, and far beyond Atlantic Richfield.

Superfund sites are located in some of the most densely populated regions in the country. EPA, *Superfund National Priorities List (NPL) Where You Live Map*, goo.gl/eT92CR. Montana itself has 17 Superfund sites totaling many hundreds of square miles, located within or near some of Montana's largest cities, including sites in or near the cities of Billings, Missoula, Helena, Great Falls, Bozeman, and Butte. Atlantic Richfield has already spent over $1.4 billion to address Superfund obligations in Montana, and is not yet finished with its work. The Smelter site itself is contiguous with three other massive sites; together they form the largest Superfund complex in the country, spanning roughly 500 square miles. The final tally for the complex alone is expected to exceed one billion dollars. Joe Griffen & David Williams, *Ready, Fire, Aim: Daines and Pruitt to Fix Berkeley Pit Disaster*, Missoulian (Mar. 17, 2017), goo.gl/8Kth32. Over 50,000 Montanans live or own property within the borders of a Superfund site. And as many as 250,000 people—nearly a quarter of the State's total population—live in close proximity to a site. EPA, *Superfund Sites in Region 8*, goo.gl/psbrnB; U.S. Census Bureau, *QuickFacts*, goo.gl/FCALki.

Left undisturbed, the decision below will undermine EPA cleanups across the entire State and would provide a troubling roadmap for landowners and courts throughout the country. As EPA noted below, "recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres" in Montana alone. App. 73a. This most immediately includes the roughly 9,000 other

individuals residing at Anaconda, who could demand remedial action that conflicts not only with EPA's plan, but with the action sought by plaintiffs who sued the time before. Indeed, following issuance of the court's opinion, plaintiffs' lawyers began soliciting new plaintiffs to join this lawsuit, and they have publicly discussed bringing another suit on behalf of Anaconda residents. *See* Kathie R. Miller, *Attorneys Discuss Possibility of Lawsuit Against ARCo for Anaconda Residents*, Anaconda Leader, Jan. 24, 2018, at 1.

Plaintiffs at other sites will surely follow suit if this Court does not step in. EPA will be unable to craft remediation plans with any assurance that some property owner will not tear it all up. These suits have the potential to cause greater harm to the environment, at great risk to hundreds of thousands of citizens of Montana alone. And even if no more suits are filed, thousands of Montana residents may immediately undo EPA's remediation by conducting their own unilateral work at sites without obtaining EPA's approval.

The potential burdens on EPA and its private remediation partners are enormous. On average, remediating a Superfund site costs tens of millions of dollars, and, at larger sites, that number soars to nearly $200,000,000.[8] Mining sites—and 12 of Montana's sites are mining sites—are the most expensive, typically costing three times more than the next-most-expensive sites, manufacturing sites.[9] It

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[8] Katherine N. Probst, *Superfund 2017: Cleanup Accomplishments and the Challenges Ahead* 5 & n.12 (2017), goo.gl/Lm4Dqi.

[9] GAO, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate*

takes, on average, ten years from when a site is first proposed as a Superfund site to when it is deemed "construction complete," and almost 15 years for more expensive cleanups.[10] And even after construction is complete, fully executing EPA's remediation plans often requires many more years—and sometimes decades—of additional work, maintenance, and monitoring.[11]

The decision below threatens every company that has worked in good faith with EPA with new lawsuits requiring these companies to spend tens or hundreds of millions of dollars undoing the work the companies have already put in. This Court regularly reviews decisions of the Montana Supreme Court that raise important questions of federal law. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Am. Tradition P'ship v. Bullock*, 567 U.S. 516 (2012); *PPL Mont., LLC v. Montana*, 565 U.S. 576 (2012). It should also do so here.

Future Program Funding Requirements, GAO-09-656 at 58 tbl.11 (2009), goo.gl/2TktVW.

[10] *Id.* at 70 tbl.15.

[11] Probst, *supra* note 8, at 15.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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April 27, 2018

APPENDIX

APPENDIX A

OP 16-0555

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2017 MT 324

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE HON. KATHERINE M. BIDEGARAY,

Respondent,

ORIGINAL PROCEEDING:

Petition for Writ of Supervisory Control
District Court of the Second Judicial District,
In and for the County of Silver Bow,
Cause No. DV-08-173BN
Honorable Katherine M. Bidegaray,
Presiding Judge

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Filed:
/s/ [Illegible]
Clerk

OPINION AND ORDER

Justice James Jeremiah Shea delivered the Opinion and Order of the Court.

¶1 Petitioner Atlantic Richfield Company ("ARCO") petitioned this Court for a writ of supervisory control, seeking reversal of five orders of the Second Judicial District Court in Silver Bow County in the matter of *Christian, et al. v. Atlantic Richfield Co.* Relevant to the issue before us, the action in the District Court concerns a claim for restoration damages brought by property owners in and around the town of Opportunity, Montana (hereafter referred to as "Property Owners"). We accepted supervisory control of this case for the limited purpose of considering the District Court's August 30, 2016 Order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th). We restate the issues as follows:

> *Issue One: Whether the Property Owners' claim constitutes a challenge to EPA's selected remedy, and thus does not comply with CERCLA's timing of review provision.*
>
> *Issue Two: Whether the Property Owners are "Potentially Responsible Parties," and thus cannot proceed with their chosen restoration activities without EPA approval.*
>
> *Issue Three: Whether the Property Owners' claim otherwise conflicts with CERCLA, and is thus preempted.*

PROCEDURAL AND FACTUAL BACKGROUND

¶2 The Anaconda Smelter, originally constructed by the Anaconda Copper Mining Company, processed copper ore from Butte for nearly one hundred years before shutting down in 1980. Also in 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, et seq. Also known as "Superfund," the purpose of CERCLA is to foster the cleanup of sites contaminated by hazardous waste, and to protect human health and the environment. In 1983, the Environmental Protection Agency ("EPA") designated the area impacted by the Anaconda Smelter, now owned by ARCO, as a Superfund site. In 1984, EPA issued an administrative order requiring ARCO to begin a remedial investigation at the Smelter Site. In 1998, EPA selected a remedy pursuant to CERCLA that detailed ARCO's cleanup responsibilities moving forward.

¶3 As part of ARCO's cleanup responsibility, EPA required ARCO to remediate residential yards within the Smelter Site harboring levels of arsenic exceeding 250 parts per million in soil, and to remediate all wells used for drinking water with levels of arsenic in excess of ten parts per billion. The Property Owners, a group of ninety-eight landowners located within the bounds of the Smelter Site, sought the opinion of outside experts to determine what actions would be necessary to fully restore their properties to pre-contamination levels. The experts recommended the Property Owners remove the top two feet of soil from affected properties and install permeable walls to remove arsenic from the groundwater. Both remedies required restoration work in excess of what the EPA required of ARCO in its selected remedy.

¶4 The Property Owners filed this action in 2008, claiming common law trespass, nuisance, and strict liability against ARCO, and seeking restoration damages. Any recovered restoration damages are to be placed in a trust account and distributed only for the purpose of conducting restoration work.

¶5 In 2013, ARCO moved for summary judgment on the grounds that CERCLA barred the Property Owners' claims. The District Court did not address ARCO's CERCLA preemption issue because it dismissed the Property Owners' case on the basis that their claims were barred by the statute of limitations. The Property Owners appealed and we affirmed in part, reversed in part, and remanded the case to the District Court for further proceedings. *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 79, 380 Mont. 495, 358 P.3d 131. On remand, the District Court denied all of ARCO's contested motions for summary judgment. Among the orders denied was ARCO's Motion for Summary Judgment on the Property Owners' Claim for Restoration Damages as Barred by CERCLA. ARCO petitioned this Court for a writ of supervisory control, asking us to vacate four of the District Court's orders denying summary judgment and one order on a motion in limine. On October 5, 2016, we issued an order granting the writ for the limited purpose of considering the District Court's 2016 Order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th).

¶6 The Property Owners bring several claims against ARCO: (1) injury to and loss of use and enjoyment of real and personal property; (2) loss of the value of real property; (3) incidental and consequential

damages, including relocation expenses and loss of rental income and/or value; (4) annoyance, inconvenience, and discomfort over the loss and prospective loss of property value; and (5) expenses for and cost of investigation and restoration of real property. ARCO concedes that the Property Owners may move forward on their first four claims, but contend that the claim for restoration damages is preempted by CERCLA.

STANDARD OF REVIEW

¶7 We review de novo a district court's grant or denial of summary judgment, applying the same criteria of M. R. Civ. P. 56 as a district court. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. Under Rule 56(c), judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (citation omitted).

DISCUSSION

¶8 In *Sunburst School Dist. No. 2 v. Texaco*, 2007 MT 183, ¶ 34, 338 Mont. 259, 165 P.3d 1079, we held: "If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation." To recover restoration damages, a plaintiff must show (1) the injury to the property is reasonably abatable, and (2) the plaintiff has "reasons personal" for seeking restoration damages. *Lampi v. Speed*, 2011 MT 231, ¶ 29, 362 Mont. 122, 261 P.3d 1000 (citing *Sunburst*, ¶¶ 31–39). In *Sunburst*, the plaintiffs sought restoration damages from Texaco to restore their properties to the condition the properties

would have been in absent a benzene leak from a Texaco gasoline refinery. *Sunburst*, ¶ 38. Texaco argued that the plaintiffs' common law claim for restoration damages was preempted by Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), a state statute similar in purpose and scope to CERCLA. *Sunburst*, ¶ 55. We further noted in *Sunburst* that "[a] presumption exists against statutory preemption of common law claims. A statute does not take away common law claims except to the extent that the statute expressly or by necessary implication declares." *Sunburst*, ¶ 51 (internal citations omitted). Accordingly, we held: "[N]o conflict exists between DEQ's supervisory role under CECRA and restoration damages awarded under the common law. We further conclude that nothing in CECRA precludes a common law claim by necessary implication." *Sunburst*, ¶ 59.

¶9 ARCO argues that the Property Owners may not bring their state law claim for restoration damages because the claim conflicts with various provisions of CERCLA, and thus are preempted. Preemption is established expressly, through the unambiguous language of Congress in statute, or impliedly through the doctrines of field preemption or conflict preemption. *Oneok, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S. Ct. 1591, 1594–95 (2015). Field preemption exists if Congress intended the relevant federal law to entirely occupy the field. *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 109 S. Ct. 1661, 1665 (1989). There is no field preemption in this case, as CERCLA expressly allows for complementary state laws, including common law, through a series of savings clauses:

> Nothing 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).

> Nothing 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).

¶10 ARCO advances three arguments regarding how it contends CERCLA bars the Property Owners' claim for restoration damages: (1) Property Owners' restoration damages claim constitutes a direct challenge to EPA's selected remedy and CERCLA's timing of review provision, 42 U.S.C. § 9613(h) ("CERCLA § 113(h)"), prevents this Court from hearing challenges to an EPA remedy; (2) the Property Owners are "potentially responsible parties" under CERCLA, and as such may not perform any restoration activities without EPA approval; and (3) the Property Owners' claim otherwise conflicts with CERCLA and is barred under the doctrine of conflict preemption. We address each of these arguments in turn.

¶11 *Issue One: Whether the Property Owners' claim constitutes a challenge to EPA's selected remedy, and thus does not comply with CERCLA's timing of review provision.*

¶12 ARCO cites CERCLA's "timing of review" provision, § 113(h), for the proposition that CERCLA expressly preempts the Property Owners' claim by denying Montana courts jurisdiction over any challenges to a CERCLA cleanup. Section 113(h) reads, in relevant part:

> 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 of § 9604 of this title, or to review any order issued under section § 9606(a) of this title. . . .

At the outset, it bears noting that this statute begins: "No *Federal* court shall have jurisdiction under *Federal* law . . . ." (Emphasis added). Conspicuously absent is any reference to state court jurisdiction over state law claims. It is well-established that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA.

¶13 ARCO relies on a Ninth Circuit Court of Appeals case in which the Ninth Circuit read § 113(h) together with § 113(b) to conclude that Montana state courts lack jurisdiction over any claims that "constitute 'a challenge to a CERCLA cleanup.'" *ARCO Envtl. Remediation, LLC v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000). The Ninth Circuit concluded that because § 113(b) grants federal courts "exclusive original jurisdiction over all controversies arising under [CERCLA]," it interpreted § 113(h)'s reference to "challenges to removal or remedial action" to be a "controversy arising under [CERCLA]," and thus exclusively within the jurisdiction of the federal courts. *ARCO Envtl. Remediation*, 213 F.3d at 1115.

¶14 Irrespective of this jurisdictional question, however, ARCO acknowledges that its argument for conflict preemption under § 113(h) turns on whether the Property Owners' claim for restoration damages "challenges" the CERCLA cleanup. We have not previously addressed what constitutes a "challenge" within the context of § 113(h). In *ARCO Environmental Remediation* the Ninth Circuit defined a "challenge" as a claim that "is related to the goals of the cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115. More specifically, the Ninth Circuit further held that a "challenge" was any action in which a party seeks "to dictate specific remedial actions; to postpone the cleanup; to impose additional reporting requirements on the cleanup; or to ... alter the method and order of cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115 (internal citations omitted). Another definition comes from the Southern District of Indiana. In *Taylor Farm Ltd. Liab. Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 974–75 (S.D. Ind. 2002), the Indiana District Court rejected the defendant's proposed definition of a challenge as being anything more comprehensive than the EPA-selected remedy. The Court held:

> [T]he only sense in which Taylor's lawsuit can be said to "challenge" Viacom's settlement agreement with the EPA is that, if Taylor is successful, Viacom will be required to spend more money to clean up the land for Taylor's benefit than the EPA required Viacom to spend for the public's benefit.

Taylor Farm, 234 F. Supp. 2d at 976. Yet another interpretation comes from *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1315–16 (N.D. Fla 2001), in which the Florida District Court concluded the plaintiffs' claim was not a "challenge" under § 113(h), because:

> [It] is not an action designed to review or contest the remedy selected by the EPA prior to implementation; it is not an action designed to obtain a court order directing the EPA to select a different remedy; it is not an action designed to delay, enjoin, or prevent the implementation of a remedy selected by the EPA; and it is not a citizen suit brought pursuant to 42 U.S.C. § 9659.

Still other interpretations come from the Third Circuit in *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019, 1024 (3rd Cir. 1991) (holding a claim is a challenge only if it "would interfere" with or "delay[] the prompt cleanup" of hazardous sites); and the District of New Mexico in *Reynolds v. Lujan*, 785 F. Supp. 152, 154 (D.N.M. 1992) (holding a claim is a challenge if it would require the court to "alter the [EPA's] ongoing response activities.").

¶15 Synthesizing the various interpretations of what constitutes a "challenge" in light of the nature of the Property Owners' claim and CERCLA's savings clauses evinces that, fundamentally, 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. At a minimum, a "challenge" must be more than merely requiring ARCO to spend more money to clean up the land for the Property Owners' benefit, as the court in *Taylor Farm* noted. In this case, the restoration damages Property Owners seek are to be placed in a trust account and used to further restore affected properties beyond the levels required by the EPA, and the restoration work would be completed by the Property Owners themselves. To the extent that EPA's work is ongoing, the Property Owners are not seeking to interfere with that work, nor are they seeking to stop, delay, or change the work EPA is

doing. The Property Owners' claim is exactly the sort contemplated in CERCLA's savings clauses, and does not present a "challenge" to EPA's selected remedy. Absent a "challenge" to removal or remedial action selected in the CERCLA cleanup process, §§ 113(h) and (b) do not deprive Montana courts of jurisdiction to entertain state-law restoration claims.

¶16 Despite ARCO's efforts to overcomplicate this matter and recast what is, at its essence, a common law claim for damages into a challenge to EPA's cleanup, the fundamental issue before us is one of timing. Specifically, when can private landowners bring a state common law claim for restoration damages for the purpose of cleaning up their own private property? The Dissent maintains that any such claim, if it relates to the goals of the cleanup, must wait until the EPA has completed its work and moved on because CERCLA "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." Dissent, ¶ 48, quoting *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (hereinafter referred to as *MESS*) (emphasis in original). Even by the Dissent's analysis, though, the Property Owners' claim does not constitute a challenge to EPA's plan. The Dissent cites a litany of cases from other jurisdictions in ostensible support of the contention that the Property Owners' damage claim constitutes a challenge to EPA's remediation plan. Dissent, ¶ 44. These cases are inapposite to the Property Owners' claim presently before us. None of the cases cited by the Dissent, nor any of the cases cited by ARCO or the United States, involve a claim by private property owners, against another private party, seeking money damages for the purpose of restoring their own private property. The Property Owners are not asking the

Court "to dictate specific remedial actions." The Property Owners are not asking the Court to "impose additional reporting requirements on the cleanup." The Property Owners are not asking the Court to "terminate the Remedial Investigation/Feasibility Study (RI/FS) and alter the method and order of cleanup." Nothing in the Property Owners' claim for restoration damages "stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA," unless Congress's objective was to condemn, in perpetuity, the private property of an individual property owner because that property happened to have been contaminated by a third party.

¶17 Put simply, the Property Owners are not asking the Court to interfere with the EPA's plan. The Property Owners are 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 whatsoever. The Property Owners are simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan. If the jury awards restoration damages, those damages will be placed in a trust for the express purpose of effectuating the Property Owners' restoration plan. Indeed, any restoration will be performed by the Property Owners themselves and will not seek to force the EPA to do, or refrain from doing, anything at the Site.

¶18 The Dissent contends that § 113(h) requires rejecting claims that challenge EPA's *ongoing* remedial action. Dissent, ¶ 43. What, if any, actual remedial action remains ongoing is, at least, unclear. Even assuming there is something that would constitute ongoing remedial action, however, this still does not morph the Property Owners' claim for restoration

damages—for purposes of funding an eventual restoration according to the Property Owners' plan—into a challenge to EPA's cleanup. As Justice Baker notes in her concurrence, the United States' counsel acknowledged during oral argument that some aspects of the Property Owners' restoration plan would not constitute a "challenge" within the meaning of the law. Concurrence, ¶ 32. As to other aspects of the Property Owners' restoration plan, even the federal government has to pull up stakes at some point and leave these private property owners alone to attend to their own private property. If the Property Owners must wait for that eventuality to conclude their restoration plan, the history of this case amply demonstrates that they have the patience for it.

¶19 Whether or not the Property Owners succeed on their claim for restoration damages will not affect, alter, or delay EPA's work in any fashion. Likewise, EPA's work, whether ongoing or not, has no bearing on the success or failure of the Property Owners' claim for restoration damages on the merits. In *Sunburst*, we noted "that CECRA's focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law." *Sunburst*, ¶ 59. The same reasoning applies here: CERCLA's regulatory standards do not apply to the common law claim at issue. The District Court has already recognized this fact when it granted the Property Owners' motion in limine to preclude ARCO from presenting evidence regarding its compliance with EPA requirements, and correctly noted that allowing such evidence at trial "pose[d] the clear risk for ARCO to 'cloak itself' in the authority of the federal government." *See Sunburst*, ¶¶ 107, 121 (discussing Texaco's efforts to cloak itself in the authority of the State of Montana in order to create confusion). That

being noted, nothing in our holding here should be construed as precluding ARCO from contesting the Property Owners' restoration damages claim on its own merits, just as it may contest the Property Owners' other claims.

¶20 The Property Owners' claim for restoration damages in this case arises solely under state common law, and does not implicate federal law or cleanup standards. The Property Owners are not seeking to compel EPA to do, or refrain from doing, any action. Therefore, the Property Owners' claim does not implicate § 113(h), nor does it implicate § 113(b). *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1455 (6th Cir. 1991) ("Clearly preserved [by § 113(h)], are challenges to the selection or adequacy of remedies based on state nuisance law . . . independent of federal response action.").

¶21 *Issue Two: Whether the Property Owners are "Potentially Responsible Parties," and thus cannot proceed with their chosen restoration activities without EPA approval.*

¶22 ARCO argues that under 42 U.S.C. § 9622(e)(6) ("CERCLA § 122(e)(6)"), the Property Owners are "Potentially Responsible Parties" ("PRP"), and are thus prohibited from conducting any remedial action that is inconsistent with EPA's selected remedy without EPA's consent. There are several categories of PRPs. For purposes of our analysis, however, the only relevant category is a class consisting of all current owners of property at a CERCLA facility. 42 U.S.C. § 9607(a)(1).

¶23 Designation as a PRP may occur in one of three ways: (1) if the party has entered into a voluntary settlement with the EPA; (2) upon a judicial determination that the party is a responsible party; or (3) if

the party is currently a defendant in a CERCLA lawsuit and has been found not to be entitled to statutory defenses. *Taylor Farm*, 234 F. Supp. 2d at 966–71 (citing *Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.*, 142 F.3d 769, 773, n.2 (4th Cir. 1998) and *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120, n.2 (3d Cir. 1997)). The statutory defenses relevant to the Property Owners are the "innocent landowner" defense and the "contiguous landowner" defense. 42 U.S.C. § 9607(b)(3), (q).

¶24 ARCO argues that a PRP is a strictly defined category, subject to liability even if the PRP did not cause or contribute to the contamination. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956–57 (9th Cir. 2013). ARCO also contends that even if the Property Owners were able to avail themselves of a defense to liability for cleanup costs, they would still meet the broader definition of PRP, and be bound by § 122(e)(6). Essentially, ARCO asks us to treat the Property Owners as PRPs under § 122(e)(6), even though they have never been treated as PRPs for any purpose—by either EPA or ARCO—during the entire thirty-plus years since the Property Owners' property was designated as being within the Superfund site. As the Property Owners correctly point out, the statute of limitations for such a claim (at most six years from the date cleanup work was initiated) has long passed. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010). Put simply, the PRP horse left the barn decades ago.

¶25 The Property Owners have never entered into a voluntary settlement with the EPA. There has never been a judicial determination that the Property Owners are responsible parties. The Property Owners are not currently, nor have they ever been, defendants in a CERCLA lawsuit in which they were found not to

be entitled to statutory defenses. The EPA has not included the Property Owners as a defendant in the legal proceedings in this matter, nor have they been party to any settlement agreements regarding cleanup proceedings. Despite the EPA never engaging the Property Owners as PRPs, ARCO now asks us to treat the Property Owners as PRPs—for the first time in these proceedings solely for the purpose of using § 122(e)(6) to bar their claim for restoration damages. We decline to do so.

¶26 *Issue Three: Whether the Property Owners' claim otherwise conflicts with CERCLA, and is thus preempted.*

¶27 ARCO's final argument is that other conflicts exist between CERCLA and the Property Owners' claim for restoration damages. ARCO proffers three lines of reasoning for this argument. First, ARCO argues that the EPA has sole authority to select environmental remedies at Superfund sites, which would preclude alternative standards and remedies. To adopt this reasoning would be to ignore CERCLA's savings clauses. As stated above, CERCLA's savings clauses expressly contemplate the applicability of state law remedies. 42 U.S.C. §§ 9614(a), 9652(d). Second, ARCO contends there is an "unambiguous congressional intent to foreclose any state law remedy that challenges or obstructs EPA's remedy at a Superfund site." This argument fails for the same reason that § 113(h) does not apply: the Property Owners' claim does not prevent the EPA from accomplishing its goals at the ARCO Site. Lastly, ARCO again characterizes the Property Owners' claim as a challenge to EPA's selected remedy, and argues that the claim cannot proceed until EPA's remedy is fully performed. Yet CERCLA's savings clauses operate to preserve the

Property Owners' ability to pursue this claim. 42 U.S.C. § 9652(d) ("*Nothing* 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." (emphasis added)). CERCLA does not expressly or impliedly preempt the Property Owners' claim for restoration damages in this matter.

CONCLUSION

¶28 We conclude that the District Court did not err by Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th). To be clear, ARCO is not precluded from contesting the merits of the Property Owners' restoration plans. However, that is an issue of fact to be resolved at trial.

¶29 THEREFORE, IT IS ORDERED:

¶30 The District Court's order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th) is AFFIRMED. This matter is remanded to the District Court for further proceedings consistent with this Opinion.

DATED this 29th day of December, 2017.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ JAMES MANLEY
Sitting for Chief Justice Mike McGrath

/S/ JOHN KUTZMAN
Sitting for Justice Jim Rice
/S/ MICHAEL E WHEAT
/S/ DIRK M. SANDEFUR

Justice Beth Baker, specially concurring.

¶31 I understand the Court's decision today to be a narrow one: CERCLA does not, as a matter of law, preempt all common-law claims for restoration damages to the property of a private individual. I agree with that conclusion and with the decision not to treat the Property Owners as PRPs. I thus concur with the Court's ruling that the District Court did not err in denying ARCO's motion for summary judgment on the restoration damages claims. I appreciate the Dissent's thorough analysis of CERCLA § 113(h), but do not agree that it applies to foreclose the Property Owners' claims.

¶32 It became clear during oral argument in this case that the parties dispute whether aspects of the Property Owners' proposed restoration plan would conflict with actions ARCO has taken in the Superfund cleanup effort. ARCO's counsel characterized the dispute as one of jurisdiction, which empowers the trial court to determine underlying facts. Here, the trial court determined, for conflict preemption purposes, that the Property Owners' claims did not stand as an obstacle to the CERCLA cleanup underway or impede EPA's requirements on the site. Amicus curiae the United States argues that the purpose of CERCLA is to assure that EPA coordinates the cleanup between multiple stakeholders, so that the selected plan may move forward without obstruction, delay, or the diversion of resources that would accompany multiple individual plans and proposals. The government stresses

that state-court lawsuits cannot, under § 113(h), supplement EPA's selected response-action cleanup levels if such a proposed plan challenges or conflicts with EPA's proposed remedy. The government recognizes, though, that CERCLA does not bar all state-law claims by affected landowners, and its counsel acknowledged during oral argument that some aspects of the Property Owners' plan would not be a "challenge" within the meaning of the law. The Property Owners' counsel protested during argument that it was the first time they had heard that some aspects of their plan would "undo" what already has been done, and that in nine years of litigation no evidence had been presented to the District Court that the Property Owners' plan conflicted with EPA's remedy.

¶33 The large-scale environmental remediation projects made possible by CERCLA are intended, and are essential, to clean up severe widespread contamination resulting from decades of historic mining practices that left expansive deposits of toxic tailings and particulate fallout in floodplains, ranchlands, and soils. The massive cleanup efforts in which ARCO, EPA, and the State of Montana have engaged for more than thirty years have gone far to remediate the Superfund site. But CERLCA draws a distinction between remedial action and damages for injury to, destruction of, or loss of natural resources. 42 U.S.C. § 9607(a)(4)(A), (C). Outside of the remediation process, States may pursue recovery of damages on behalf of the public as trustee of the state's natural resources to "*restore*, replace, or acquire the equivalent of such natural resources by the State." 42 U.S.C. § 9607(f)(1) (emphasis added). "CERCLA sets a floor, not a ceiling." *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1246 (10th Cir. 2006). And CERCLA does not cover damages to "purely private property." *Ohio v. U.S. Dep't of*

the Interior, 880 F.2d 432, 460 (D.C. Cir. 1989). It does not force local residents simply to live with the impacts if they can prove, through their nuisance and trespass actions, that state law entitles them to damages for the restoration of their own land. As the Court observes, consistent with our parallel conclusion in *Sunburst*, CERCLA's "focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law." Opinion, ¶ 19 (quoting *Sunburst*, ¶ 59). The dynamic between individual restoration and CERCLA's coordinated large-scale response does not give rise to preemption as a matter of law. "Tension between federal and state law is not enough to establish conflict preemption. We find preemption only in those situations where conflicts will necessarily arise. A hypothetical conflict is not a sufficient basis for preemption." *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007) (internal citations and quotations omitted).

¶34 In our limited Order accepting supervisory control in this case, we did not agree to review the District Court's orders in limine. But the Court observes that ARCO is not precluded at trial from contesting the merits of the Property Owners' restoration plans. Opinion, ¶¶ 19, 28. A claim for restoration damages requires the Property Owners to prove two separate elements: (1) temporary injury and (2) reasons personal for the restoration. *Lampi*, ¶ 29 (quoting *Sunburst*, ¶¶ 31-39). An injury is temporary "if the tortfeasor could restore the destroyed property to substantially the condition in which it existed before the injury. An injury that would cease to exist once remediation or restoration has been completed qualifies as temporary." *Lampi*, ¶ 32 (internal citations omitted). For temporary injury, the ability to repair

the injury "must be more than a theoretical possibility." *Sunburst*, ¶ 31 (citing *Burk Ranches v. State*, 242 Mont. 300, 306, 790 P.2d 443, 447 (1990)).

¶35 The "reasons personal" element requires the Property Owners "to establish that the award actually will be used for restoration." *Lampi*, ¶ 31. The "personal reasons" analysis is required only when the restoration costs "exceed disproportionately" the diminution in value of the property. *McEwen v. MCR, LLC*, 2012 MT 319, ¶ 30, 368 Mont. 38, 291 P.3d 1253; *Sunburst*, ¶ 38. Finally, an "injured party is to be made as nearly whole as possible—but not to realize a profit. Compensatory damages are designed to compensate the injured party for actual loss or injury—no more, no less." *Sunburst,* ¶ 40 (*quoting Burk Ranches*, 242 Mont. at 307, 790 P.2d at 447).

¶36 "[T]hese issues normally present factual questions for the jury to resolve." *Lampi*, ¶ 48. The Court acknowledges the District Court's concern about allowing ARCO to "'cloak itself' in the authority of the federal government." Opinion, ¶ 19. I write separately to add that if ARCO contends that the Property Owners' proposed remedy conflicts with or requires modification of measures ARCO already has taken to clean up the site, ARCO must be able to address those conflicts in seeking to rebut the Property Owners' claim on the essential elements of proof under our standards for a restoration damages claim. What ARCO may not do at trial is point to the EPA's selected remedy and say, "We've done everything the government required; that's all we need to do." What ARCO may do is offer evidence to support its claim that the Property Owners' proposed restoration plan is not feasible and thus does not qualify as a temporary injury. And the Property Owners should have the opportunity to prove their claim that ARCO's cleanup

efforts to date have not returned their properties to substantially the same condition in which they were before the injury, but that the injury will cease to exist if their proposed restoration plan is implemented. The Property Owners' proposals should be considered by the jury in the context of determining whether ARCO is liable for their alleged injuries and whether those injuries are compensable by an award of restoration damages. Evidence on the issue of temporary injury may well overlap with the evidence required to show, pursuant to our holding in *Atlantic Richfield Co.*, ¶ 77, whether the continuing tort doctrine tolled the period of limitations for the Property Owners' claims. It makes sense to allow the parties to develop the evidence for the jury's consideration of these issues and a record that may be reviewed, if necessary, on appeal from any final judgment.

/S/ BETH BAKER

Justice Laurie McKinnon, dissenting.

¶37 Property Owners seek monetary damages for state law claims of nuisance, trespass, and strict liability. ARCO does not contest that litigation of these state law claims may proceed during the pendency of the CERCLA cleanup process and, accordingly, that issue is not before the Court. ARCO does contend that Property Owners' claim for restoration damages proposes a different cleanup plan than that chosen by the EPA, thus constituting a challenge which is preempted by CERCLA. In my view, Property Owners' restoration plan, which includes digging an 8,000-foot trench for a groundwater wall and removing 650,000 tons of soil over a period of years, would conflict with the ongoing EPA investigation and CERCLA

cleanup.[1] The Court's conclusion that, during the pendency of a CERCLA cleanup effort, a jury may determine restoration damages and place the amount of money so determined in a trust for future restoration efforts, Opinion, ¶ 17, is not only inconsistent with CERCLA and federal precedent, but has no authority in Montana law.[2] Property Owners may not "achieve indirectly through the threat of monetary damages . . . what [they] cannot obtain directly through mandatory injunctive relief incompatible with the ongoing CERCLA-mandated remediation." *New Mexico*, 467 F.3d at 1250. Moreover, "[d]amages must be proven by substantial evidence which is not the product of mere guess or speculation." *Sebena v. Am. Auto. Ass'n*, 280 Mont. 305, 309, 930 P.2d 51, 53 (1996). "[W]here no costs have been incurred, and no costs are reasonably certain to be incurred in the future, the plaintiff has not stated a claim for damages," and summary judgment should be granted. *Town of Superior v. Asarco,*

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[1] To recover restoration damages under Montana law, the plaintiff must present evidence and convince the fact-finder that he will actually conduct the restoration upon which the restoration claim is based. *Lampi*, ¶ 31 ("The reasons personal rule requires plaintiff to establish that the award actually will be used for restoration . . . ."); *Sunburst*, ¶ 43; *McEwen*, ¶ 50. It is the actual performance of Property Owners' restoration plan—a prerequisite to their damage award—that impermissibly challenges the EPA's remedy. For purposes of brevity, I do not address other provisions of CERCLA which ARCO asserts would bar Property Owners from completing their restoration plan.

[2] The Court errs when it applies the *Sunburst* analysis to the instant proceedings. In *Sunburst*, there was no question that Montana state courts had subject-matter jurisdiction over CERCLA and common law claims. Here, however, CERCLA-related activities are the exclusive, original jurisdiction of the federal courts and a challenge in state court to the chosen EPA remedy implicates the Supremacy Clause of the United States Constitution.

Inc., 874 F. Supp. 2d 937, 949 (D. Mont. 2004). *See also B.M. v. State*, 215 Mont. 175, 179, 698 P.2d 399, 401 (1985) ("Where plaintiff presents evidence of damages which are purely speculative, summary judgment is appropriate."). Here, there is no genuine issue of material fact that Property Owners' claim for restoration damages is a challenge to the EPA's remedial action and prohibited by CERCLA as a matter of law.

¶38 CERCLA is a "comprehensive statute that grants the President 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, 114 S. Ct. 1960, 1964 (1994).[3] "CERCLA is best known as setting forth a comprehensive mechanism to cleanup hazardous waste sites under a *restoration-based* approach." *New Mexico*, 467 F.3d at 1244 (citation omitted; emphasis added). CERCLA was intended to "promote the timely cleanup of hazardous waste sites, ensure that polluters were held responsible for the cleanup efforts, and encourage settlement through specified contribution protection." *Chubb*, 710 F.3d at 956. "One of the core purposes of CERCLA is to foster settlement through its system of incentives and without unnecessarily further complicating already complicated litigation." *Cal. Dep't of Toxic Substances Control v. City of Chico*, 297 F. Supp. 2d 1227, 1235 (E.D. Cal. 2004). *See also In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992) ("Congress sought through CERCLA . . . to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation."); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1264 (9th Cir. 2010) (noting

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[3] CERCLA vests authority in the President, who, in turn, has delegated most of his functions and authority to the EPA. *See* 42 U.S.C. §§ 9606(c), 9615; 40 C.F.R. § 300.100.

that CERCLA was designed to ensure, *inter alia*, "that settlements are encouraged through specified contribution protection"); 42 U.S.C. § 9622. Under CERCLA § 113(f)(2), "[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." 42 U.S.C. § 9613(f)(2).

¶39 There are two types of cleanup actions under CERCLA: remedial actions and removal actions. Remedial actions generally are "long-term or permanent containment or disposal programs" while removal actions are "typically short-term cleanup arrangements." *Schaefer v. Town of Victor*, 457 F.3d 188, 195 (2d Cir. 2006) (citation and quotation omitted). CERCLA defines "remedial action" as:

> [T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, *to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment*. The term includes, *but is not limited to*, such actions at the location of the release as storage, *confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials*, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, *collection of leachate and runoff*, onsite treatment or incineration, provision of alternative water

> supplies, *and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment*. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24) (emphasis added).

¶40 CERCLA defines "remove" or "removal" as:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary . . . to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, pro-

> vision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for . . . .

42 U.S.C. § 9601(23).

¶41 CERCLA-related activities may qualify as removal or remedial actions in at least three ways. *Hanford Downwinders Coal. v. Dowdle*, 71 F.3d 1469, 1474 (9th Cir. 1995). First, the action may be specifically designated as removal or remedial activity. *Hanford Downwinders*, 71 F.3d at 1474. Second, cleanup activity explicitly classified in CERCLA as a "response" is, by definition, a removal or remedial action. *See* 42 U.S.C. § 9601(25) (defining "response" as a "removal" or "remedial action"). Finally, "even if action taken at a CERCLA site is not referred to in the statute as a removal or remedial action or a response action, the Timing of Review provision will still apply if the action satisfies CERCLA's definition of 'removal' or 'remedial.'" *Hanford Downwinders*, 71 F.3d at 1474.

¶42 CERCLA provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA]." 42 U.S.C. § 9613(b). Section 113(h) of CERCLA, titled "Timing of review," provides an exception to federal jurisdiction during the pendency of a CERCLA removal or remedial action: "No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action . . . ." 42 U.S.C. § 9613(h). Section 113(h) clearly and unequivocally precludes contemporaneous challenges to CERCLA cleanups, regardless of whether the challenge is made pursuant to federal or state law. Section 113(h) amounts to a "blunt withdrawal of federal jurisdiction" and precludes any challenge to CERCLA cleanups. *N. Shore Gas Co. v. EPA*, 930 F.2d

1239, 1244 (7th Cir. 1991); *accord Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1075 (11th Cir. 2002). "Section 113 withholds federal jurisdiction to review any . . . claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute 'challenges' to ongoing CERCLA cleanup actions." *MESS*, 47 F.3d at 329. Read in conjunction, § 113(b) and (h) divest state courts of jurisdiction to review any state law claim which amounts to a challenge of a CERCLA removal or remedial action. *Fort Ord Toxics Project v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999). In *Fort Ord Toxics Project*, the Ninth Circuit observed that "by granting district courts exclusive jurisdiction over all controversies arising under CERCLA, Congress used language more expansive than would be necessary if it intended to limit exclusive jurisdiction solely to those claims created by CERCLA." *Fort Ord*, 189 F.3d at 832 (internal quotations and citations omitted).

¶43 The Ninth Circuit explained, "Congress concluded that the need for [swift execution of CERCLA cleanup plans] was paramount, and that peripheral disputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in progress." *MESS*, 47 F.3d at 329 (internal quotations and citations omitted). Accordingly, § 113(h) "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort. This result furthers the policy underlying CERCLA by allowing a quick response to serious hazards." *MESS*, 47 F.3d at 329 (emphasis in original). The court explained in *MESS*:

> We recognize that the application of Section 113(h) may in some cases delay judicial review for years, if not permanently, and may

> result in irreparable harm to other important interests. Whatever its likelihood, such a possibility is for legislators, and not judges, to address. We must presume that Congress has already balanced all concerns and concluded that the interest in removing the hazard of toxic waste from Superfund sites clearly outweighs the risk of irreparable harm.

MESS, 47 F.3d at 329 (internal quotations, citations, and footnote omitted). In *MESS*, the court was careful to explain that it was not deciding "whether or to what extent the district court can entertain MESS's various claims after implementation of the CERCLA cleanup at McClellan is complete." *MESS*, 47 F.3d at 329, n.6. Accordingly, § 113(h) bars *any* claim that challenges an ongoing CERCLA cleanup effort. Further, the language of § 113(h) does not distinguish between federal and state claims or constitutional and statutory claims; instead, it delays judicial review of *any* challenges to unfinished remedial EPA efforts. *See Broward Gardens*, 311 F.3d at 1075.

¶44 The Ninth Circuit has provided clear guidance concerning what constitutes a "challenge" to a CERCLA cleanup effort. In *Razore v. Tulalip Tribes*, the court explained that "[a]n action constitutes a challenge if it is *related to the goals of the cleanup*." 66 F.3d 236, 239 (9th Cir. 1995) (emphasis added). Challenges to CERCLA cleanups were found where the plaintiff seeks to dictate specific remedial actions, *Hanford Downwinders*, 71 F.3d at 1482; to postpone cleanup, *Fort Ord*, 189 F.3d at 831; to impose additional reporting requirements on the cleanup, *MESS*, 47 F.3d at 330; and to terminate the Remedial Investigation/Feasibility Study (RI/FS) and alter the method and order of cleanup, *Razore*, 66 F.3d at 239. Consistent with the Ninth Circuit, the Tenth Circuit

has held that a state claim is preempted by CERCLA if the "claim, or any portion thereof, stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA." *New Mexico*, 467 F.3d at 1244. The Eleventh Circuit similarly explained that "[t]o determine whether a suit interferes with, and thus challenges, a cleanup, courts look to see if the relief requested will impact the remedial action selected." *Broward Gardens*, 311 F.3d at 1072. The Eighth Circuit held that a suit challenges a remedial action within the meaning of § 113(h) if it interferes with the implementation of a CERCLA remedy. *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998).

¶45 The Ninth Circuit has also distinguished when a claim does not constitute a challenge to a CERCLA cleanup effort. In *Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995), the court held that a state law claim by water users seeking financial compensation for lost crops and profits resulting from the EPA's diversion of water was not a challenge to the CERCLA cleanup plan; however, the water users' claim for injunctive relief to prevent ARCO from diverting the water was a challenge to the EPA cleanup. In *ARCO Environmental Remediation*, 213 F.3d at 1113, a state law claim for access to public records and meetings did not relate to the goals of the EPA's cleanup and therefore did not constitute a challenge divesting the court of jurisdiction to entertain the claim. The lawsuit did not alter cleanup requirements or environmental standards and did not seek to delay or terminate the cleanup. Instead, the lawsuit involved the public's right to information about the cleanup. *ARCO Envtl. Remediation*, 213 F.3d at 1115.

¶46 CERCLA does not completely occupy the field of environmental regulation. Congress expressly declared that it had no intent for CERCLA to do so by enacting two savings clauses within CERCLA upon which Property Owners rely. The first savings clause, 42 U.S.C. § 9614(a), provides: "Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." The second, 42 U.S.C. § 9652(d) provides: "Nothing in this Act 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." Furthermore, Congress recognized the role of state law in hazardous waste cleanup when it addressed the overlap of CERCLA and state law in 42 U.S.C. § 9614(b), which provides, in relevant part, that "[a]ny person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act." Congress clearly expressed "its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993); *accord Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-26 (3d Cir. 1991). The Ninth Circuit also explained that "Congress did not want § 113(h) to serve as a shield against litigation that is

unrelated to disputes over environmental standards." *Fort Ord*, 189 F.3d at 831.[4]

¶47 While a principle purpose of CERCLA's savings clauses is to reinforce the right to demand hazardous waste cleanup apart from CERCLA, a savings clause "is not intended to allow specific provisions of the statute that contains it to be nullified." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). *See also Wyoming v. United States*, 279 F.3d 1214, 1234 (10th Cir. 2002) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864, 120 S. Ct. 1913, 1916 (2000), for the proposition that "[t]he Supreme Court has 'repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law'"). "CERCLA's savings clause must not be used to gut provisions of CERCLA." *PMC*, 151 F.3d at 618. Moreover, CERCLA does not establish a "new font of law on which private parties could base claims for personal and property injuries." *Artesian Water Co. v. Gov't of New Castle Cnty.*, 659 F. Supp. 1269, 1286 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988) (internal quotations and citations omitted). The purpose of a savings clause "is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute." *PMC*, 151 F.3d at 618. Thus, CERCLA's savings clause was enacted because Congress did not want to "wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it was enacted.

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[4] For examples of state courts dismissing state law claims under § 113(h) of CERCLA, *see O'Neal v. Department of the Army*, 742 A.2d 1095, 1100 (Pa. Super. Ct. 1999), and *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032-33 (Colo. Ct. App. 1996).

The passage of federal environmental laws was not intended to wipe out the common law of nuisance." *PMC*, 151 F.3d at 618.

¶48 Any state law claim raised pursuant to CERCLA's savings clause which challenges the remediation efforts of the EPA must wait until after the response actions are completed because CERCLA "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." *New Mexico*, 467 F.3d at 1249 (quoting *MESS*, 47 F.3d at 329) (emphasis in original). When the EPA selects a remedy, no challenge to the cleanup may occur prior to completion of the remedy. This is true even if the claim is made pursuant to state law and attempts to invoke the state court's jurisdiction through CERCLA's savings clause. Federal courts have exclusive and original jurisdiction over any CERCLA-related activity. As explained in *Fort Ord*, 189 F.3d at 831, Congress made federal subject-matter jurisdiction broad, enacting a bar to jurisdiction through the provisions of § 113(h) during the pendency of a CERCLA cleanup effort. *See also Cannon v. Gates*, 538 F.3d 1328, 1336 (10th Cir. 2008). Accordingly, if the state claims call "into question the EPA's remedial response plan, it is related to the goals of the cleanup, and thus constitutes a 'challenge' to the cleanup under [§ 113(h)]." *New Mexico*, 467 F.3d at 1249.

¶49 Neither a federal court considering CERCLA-related activity nor a state court considering a state claim pursuant to CERCLA's savings clause has subject-matter jurisdiction to consider the claim when the claim constitutes a challenge to CERCLA's cleanup effort. It makes little difference that the claim originated in state court when the relief sought constitutes a challenge. In *New Mexico*, 467 F.3d at 1252, the

Tenth Circuit dismissed state claims of public nuisance and negligence for lack of subject-matter jurisdiction under § 113(h). In *Cannon*, 538 F.3d at 1334-36, the Tenth Circuit affirmed the trial court's dismissal of landowners' claims under the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-81, concluding that § 113(h) stripped subject-matter jurisdiction from the trial court to consider the claims. In *Broward Gardens*, 311 F.3d at 1076, the Eleventh Circuit affirmed the trial court's dismissal of landowners' claims because the court lacked subject-matter jurisdiction over the case because of § 113(h). In *Hanford Downwinders*, 71 F.3d at 1484, the Ninth Circuit affirmed the district court's dismissal of claims for lack of subject-matter jurisdiction and for failure to state a claim because of § 113(h). Given the substantial weight of authority which establishes the matter as being one of subject-matter jurisdiction, I am at a loss to understand how this Court can suggest, without any authority, that we "simply" allow "a jury of twelve Montanans" to "assess the merits of [the Property Owners' restoration] plan" and then instruct any resulting damages "be placed in a trust for the express purpose of effectuating the Property Owners' restoration plan." Opinion, ¶ 17. Most respectfully, the Property Owners should not be permitted to proceed to a jury trial when the District Court clearly lacks subject-matter jurisdiction over the controversy. Indeed, any order denying ARCO's motion would be reviewable as an interlocutory order pursuant to M. R. App. P. 6(3)(c).

¶50 Property Owners seek monetary damages for: (1) "Injury to and loss of use and enjoyment of real and personal property"; (2) "Loss of the value of real property . . . "; (3) "Incidental and consequential damages, including relocation expenses and loss of rental income and/or value"; (4) "Annoyance, inconvenience,

and discomfort over the loss and prospective loss of property value . . . "; and (5) "Expenses for and cost of investigation and restoration of real property" pursuant to Property Owners' restoration plan. ARCO does not dispute that Property Owners may proceed on the first four types of damages, which are being made pursuant to nuisance, trespass and strict liability.[5] ARCO does dispute that Property Owners may proceed on the fifth type of damage, contending that the District Court lacks subject-matter jurisdiction because of the ongoing CERCLA cleanup effort and the provisions of § 113(h). Accordingly, pursuant to the aforementioned authority, the District Court's grant of summary judgment to Property Owners on their claim for restoration damages must be reversed if Property Owners' restoration plan constitutes a challenge to the CERCLA cleanup effort at the Smelter Site. If Property Owners' proposed restoration plan "relate[s] to the goals of the cleanup," *Razore*, 66 F.3d at 239, it constitutes a challenge to the CERCLA cleanup effort and the District Court is divested of jurisdiction.

¶51 Property Owners assert claims based on contamination to properties located within the legally defined boundaries of a federal Superfund site. The EPA issued its first administrative order to ARCO in 1984, which required ARCO to perform a site-wide RI/FS. Following completion of the study in 1987, the EPA divided the Smelter Site into five major sections called Operable Units, each relating to different cleanup remedies. Property Owners seek to restore

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[5] Given the requirement that damages not be speculative, remote or conjectural, *Sebena*, 280 Mont. at 309, 930 P.2d at 53, it is difficult to comprehend how damages can be calculated prior to completion of CERCLA remedial efforts for those areas of compensation ARCO does not contest. *See New Mexico*, 467 F.3d at 1250. That issue, however, is not before the Court.

land contained within several of these sections. The EPA continues its cleanup efforts in the designated area consistent with its selected remedies. The EPA estimates that active remediation of the Smelter Site will not be completed until 2025. ARCO filed affidavits and reports from its expert, Richard E. Bartlett, supporting its position that cleanup is ongoing and that as recently as 2016 residential soils and pasture were being cleaned to remove arsenic. ARCO also filed an Administrative Order on Consent, entered pursuant to CERCLA, that set forth how the cleanup effort was to proceed. As a result of monitoring and reexamination, the EPA has made amendments to its cleanup plan, primarily to incorporate the federal drinking water standard for arsenic from 18 ppb to 10 ppb. The EPA also added the action level for lead in 2013. The EPA asserts that it continues to monitor, modify, and reexamine remedies since the remedial plan was first implemented, which may result in additional amendments. Once the EPA remedy is completed on the Property Owners' land, the soil will be capped or backfilled with clean soil, vegetation, or other protective barrier. ARCO and the EPA maintain that tearing up the protective cap or layer of soil could increase dust transfer, bioavailability of lead, and soil ingestion—all of which were concerns addressed by the EPA when it initially designed the cleanup plan. ARCO has filed affidavits and expert reports in support of its position. ARCO, the State, and local governments are currently negotiating a final site-wide consent decree that will encompass all remaining remedies and cleanup work to be conducted at the Smelter Site.

¶52 Property Owners propose a different cleanup or restoration plan. Property Owners do not dispute that their properties are located within the boundaries of

the Superfund site. Nor do Property Owners dispute that they seek "full restoration" of their property, which is different from that selected by the EPA. Although Property Owners and this Court conclude, without any analysis, that Property Owners are not seeking to "stop, delay, or change the work EPA is doing," Opinion, ¶ 15, the Property Owners' plan is plainly contrary to the EPA's remediation plan. *See, e.g., New Mexico*, 467 F.3d at 1249-50; *MESS*, 47 F.3d at 329. Property Owners' experts, Richard Plaus and John Kane, advocate a lower level of arsenic in the soil than that proposed by the EPA. Property Owners propose excavating the soil to a deeper level and suggest the excavated soil be transported to Spokane, rather than local depositories. Property Owners also propose that a series of underground trenches and barriers be constructed to capture and treat shallow groundwater. The reactive barriers proposed by Property Owners would be 8,000 feet long, 15 feet deep, 3 feet wide, and situated upgradient of the town. The barriers would contain enzymes designed to remove arsenic in the water, which the EPA maintains could unintentionally contaminate both ground and surface water.

¶53 A district court must determine whether the complaint states facts that, if true, would vest the court with subject-matter jurisdiction. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552. Summary judgment should be granted "'if the pleadings, depositions, answers to interrogatories, and admissions on file,' together with any affidavits demonstrate that no genuine issue exists as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law." *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 10, 344 Mont. 435, 188 P.3d 1063 (quoting

M. R. Civ. P. 56(c)). A defending party may be entitled to summary judgment on a certain type or category of damages. *See Corporate Air v. Edwards Jet Ctr. Mont., Inc.*, 2008 MT 283, ¶ 54, 345 Mont. 336, 190 P.3d 1111. Here, at the risk of stating the obvious, Property Owners request in their Third Amended Complaint "full restoration" of their properties while a restoration-based remedial plan selected by the EPA is being implemented. In addition, the affidavits and reports of each party's expert witnesses establish as a matter of law that Property Owners' claim for restoration damages challenges the EPA's selected remedial action and that the cleanup is still ongoing. Indeed, the undisputed evidence shows the EPA rejected the soil and groundwater remedies proposed by Property Owners during the course of the EPA's regulatory deliberations at the Smelter Site. In my opinion, the District Court erred, as a matter of law, in concluding that Property Owners' claim for restoration damages did not constitute a challenge to the remedial action plan chosen by the EPA.

¶54 I dissent from the Court's conclusion that Property Owners' claim for restoration damages is not barred pursuant to the provisions of § 113(h). The issue before this Court is one of subject-matter jurisdiction which, if lacking, bars Property Owners from proceeding to trial on their claim for restoration damages. I would reverse because there is no genuine dispute of fact that Property Owners' restoration claim conflicts with the ongoing EPA investigation and

CERCLA cleanup.[6] The District Court, as a matter of federal law, lacks subject-matter jurisdiction to consider Property Owners' claim for restoration damages.

/S/ LAURIE McKINNON

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[6] The question of whether Property Owners' claim for restoration damages constitutes a challenge to CERCLA cleanup efforts is pivotal to resolution of many issues in this case. For example, in *New Mexico*, 467 F.3d at 1250, the Tenth Circuit, having found that CERCLA's cleanup efforts were ongoing, determined that damages for common law public nuisance and negligence must be addressed at the conclusion of the EPA-ordered remediation. "Only then will we know the effectiveness of the cleanup and the precise extent of residual damage." *New Mexico*, 467 F.3d at 1250. Accordingly, I would not address ARCO's contention, at this juncture, that Property Owners are PRPs under 42 U.S.C. § 9622(e)(6) (CERCLA § 122(e)(6)) and therefore precluded from proceeding with their chosen remedy.

APPENDIX B

MONTANA SECOND JUDICIAL
DISTRICT COURT SILVER BOW COUNTY

Katherine M. Bidegaray
Seventh Judicial District Court
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CAUSE NO. DV-08-173 BN

GREGORY A. CHRISTIAN; *et al.*,
Plaintiffs,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant.

ORDER DENYING ARCO'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR RESTORATION DAMAGES AS BARRED BY CERCLA and GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ARCO'S CERCLA PREEMPTION AFFIRMATIVE DEFENSES (11TH - 13TH)

INTRODUCTION

On May 17, 2013, Defendant Atlantic Richfield Company ("ARCO") filed a Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA. On June 10, 2013, Plaintiffs have filed a Cross-Motion for Summary Judgment on ARCO's

CERCLA Preemption Affirmative Defenses (11th - 13th). The Court heard oral argument on both motions on June 20, 2016.

For the reasons set forth below:

1. ARCO's Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA is DENIED; and
2. Plaintiffs Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th -13th) is GRANTED.

BACKGROUND

CERCLA was enacted in 1980 to ensure the cleanup of contaminated sites and eliminate threats to human health and the environment posed by uncontrolled hazardous waste sites. CERCLA sets forth a mechanism to clean up hazardous waste sites under a remediation-based approach. *United States v. Bestfoods,* 524 U.S. 51, 55 (1998). CERCLA's principle aims are to effectuate the cleanup of hazardous waste sites and impose cleanup costs on responsible parties. *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 483 (1996). CERCLA's overall objective is to "promptly remediate polluted sites to bring land back to its original uncontaminated condition." *Johnson Controls, Inc. v. Employers Ins. of Wausau,* 665 N.W.2d 257, 273 (Wisc. 2003).

The Anaconda Smelter Site ("Site") became a federal Superfund Site in 1983. *See* 48 Fed. Reg. 40,658 (Sept. 8, 1983). Plaintiffs' properties are encompassed within the Site. Plaintiffs allege that Atlantic Richfield and its predecessors damaged their property while conducting "a milling and smelting operation located near the towns of Anaconda and Opportunity ... from 1884 to 1980."

Plaintiffs have pursued damages allowed under Montana tort law for Defendant's alleged trespass and nuisance, including restoration damages. Plaintiffs' have testified in depositions that the primary goal of this lawsuit is to have their properties restored. Plaintiffs have also disclosed expert CPA Thomas Copley, who has been retained to serve as a controller to oversee funds that are recovered by the Plaintiffs in this litigation for restoration damages and ensure that they be used for the cleanup of property.

LEGAL STANDARD

Summary judgment is an extreme remedy and should never be substituted for a trial if a material factual controversy exists. *Hajenga v. Schwein,* 2007 MT 80, & 11, 226 Mont. 507, 155 P.3d 1241. The party moving for summary judgment must demonstrate the absence of genuine issues of material fact. Only then, must the opposing party establish factual issues. *First Sec. Bank v. Jones,* 243 Mont. 301, 302, 794 P.2d 679, 681 (1990). All evidence must be viewed in the light most favorable to the party opposing summary judgment and all reasonable inferences drawn in their favor. *Oliver v. Stimson Lumber,* 1999 MT 328, & 22, 297 Mont. 336, 342, 993 P.2d 11, 16.

RATIONALE

ARCO seeks a ruling that CERCLA's timing of review provision (Section 113(h)) and CERCLA's inconsistent remedy provision (Section122 (e)(6)) bar Plaintiffs' claim for restoration damages. To bar Plaintiffs' claim, however, the Federal CERCLA provisions must preempt Plaintiffs' state common law for trespass and nuisance, which allows Plaintiffs to recover restoration damages. As recognized by the Montana Supreme Court in the context of a trespass and nuisance claim, like the one here:

> If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation.

Sunburst School Dist. No. 2 v. Texaco, 2007 MT 183 ¶34, 338 Mont. 259, 165 P.3d 1079 *(citing Roman Catholic Church v. Louisiana Gas,* 618 So.2d 874, 877 (La. 1993).

Preemption is the only way a federal law may bar recovery pursuant to state common law. *Pritchard Petroleum v. Farmers Co-Op. Oil & Sup. Co.,* 121 Mont. 1, 15, 190 P.2d 55, 63 (1948) ("A statute does not take away common law claims except to the extent that the statute expressly or by necessary implication declares.").

1. CERCLA Does Not Preempt Plaintiffs' Right to Recover Restoration Damages Pursuant to Montana's Common Law.

CERCLA does not expressly preempt Montana's common law, which allows for the recovery of restoration damages. *See New Mexico v. General Electric Co.,* 467 F.3d 1223, 1244 (10th Cir.2006) ("[w]e may safely say Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination.").

In fact, CERCLA contains three separate savings provisions preserving the right to impose additional liability for the release of a hazardous substance, one of which provides:

> 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.

42 U.S.C. § 9652(d) (emphasis added). The principle purpose of § 9652(d) "is to preserve to victims of toxic waste the other remedies they may have under federal or state law." *PMC, Inc. v. Sherwin-Williams Co.,* 151 F.3d 610, 617 (7th Cir. 1998) (citing *Beck v. Atlantic Richfield Co.,* 62 F.3d 1240, 1243 n. 8 (9th Cir. 1995)). Inclusion of these CERCLA savings provisions makes clear that Congress did not intend to preempt state causes of action. *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 25 (1983).

In the absence of express preemption, which is not present here, a federal statute may impliedly preempt a state law in two ways. First, if Congress intends that federal law should entirely occupy a particular field, state laws in that field (such as the common law right to recover restoration damages) are preempted. *California v. ARC America Corp.,* 490 U.S. 93, 100, (1989).

As stated above, Congress had no intention of occupying the fields of property law or environmental clean-up by passing CERCLA. Nor did Congress intend to preclude state law claims or damages such as those at issue in this case. Various courts have found that Congress did not preempt state laws related to hazardous waste contamination. *Fireman's Fund Ins. v. City of Lodi,* 302 F.3d 928, 941-43 (9th Cir.2002) ("Congress clearly expressed its intent that CERCLA should work in conjunction with other

federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem."); *United States v. Colorado,* 990 F.2d 1565, 1575 (10th Cir.1993); *accord Manor Care, Inc. v. Yaskin,* 950 F.2d 122, 125-26 (3d Cir.1991) (Alito, J.).

Second, if Congress does not intend to occupy the field, a state law may be preempted by federal law to the extent that it actually conflicts with federal law. *California v. ARC America Corp.,* 490 U.S. 93, 100, (1989). Allowing Plaintiffs to pursue restoration damages as allowed by Montana's common law would not conflict with CERCLA §113(h) or §122(e)(6). Actual conflict between state and federal law occurs "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Choate v. Champion Home Builders Co.,* 222 F.3d 788, 792 (10th Cir.2000). For conflict preemption to apply, the common law remedy must be a "material impediment to the federal action, or thwart [ ] the federal policy in a material way." *Id.* at 796 (quoting *Mount Olivet Cemetery Assoc. v. Salt Lake City,* 164 F.3d 480, 489 (10th Cir.1998)).

In this case, recovery of restoration damages by the Plaintiffs would not stand as an obstacle to Congress's objectives in passing CERCLA or to the CERCLA cleanup underway. The EPA has required ARCO to remove soil containing more than 250 ppm of arsenic or 400 ppm lead from all residential property within the Superfund site and to remove soil exceeding 1,000 ppm of arsenic from all pasture property. The EPA has not required ARCO take any action with respect to arsenic, lead or any other contaminant in groundwater.

Plaintiffs intend to remove all of the arsenic and other heavy metal contaminants left in their groundwater and from the upper two feet of the soil on their properties. Plaintiffs' common law property damage claims do not make it "impossible" for ARCO to comply with the EPA's requirement. Nor do Plaintiffs' common law claims impede the CERCLA framework or EPA's requirements on site. While ARCO is currently remediating portions of a minority of Plaintiffs' residential yards due to the results of testing performed in the course of this litigation, ARCO represented at oral argument that this cleanup will be finished before the trial scheduled on November 1, 2016. No further cleanup is contemplated by ARCO. Plaintiffs' restoration plan as to these properties, therefore, will not interfere with any ongoing or proposed CERCLA mandated cleanup.

2. Plaintiffs' Common Law Claim is Not a Proscribed "Challenge" to the EPA-Selected Remedy.

ARCO argues next that, regardless of whether CERCLA preempts Montana's common law right to recover restoration damages, this Court does not have jurisdiction over Plaintiffs' claim for restoration damages because Plaintiffs' restoration plan is a prohibited "challenge" to the remedial action selected by the EPA, citing CERCLA's "timing of review provision," §113(h).

Section 113(h) states:

> 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 9606(a) of this title[.][1]

42 U.S.C. § 9613(h).

In order to invoke the timing of review provision to block Plaintiffs' state law claim for restoration damages, ARCO is required to demonstrate that Plaintiffs' common law suit for trespass and nuisance is a "challenge" to the remedial action selected by the EPA, which is set forth in the Record of Decision ("ROD"). ARCO cannot satisfy this requirement. Claims are interpreted as a "challenge" pursuant to § 113(h) only if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup. *ARCO Environmental Remediation, LLP (AERL) v. Dept. of Health and Environmental Quality of Montana,* 213 F.3d 1108, 115 (9th Cir. 2000).

In this case, Plaintiffs do not seek to alter the ROD or change any of the requirements that the EPA has imposed upon ARCO. Instead, Plaintiff seeks to recover restoration damages and perform the cleanup themselves.

ARCO cites several extra-jurisdictional cases which it contends compel a determination that Plaintiffs' common law claims are a challenge to the EPA-selected remedy. However, all of the cases cited by ARCO are distinguishable in that none involve a private landowner whose common law claim for restoration damages was considered a proscribed challenge to the EPA selected remedy. For example, ARCO cites *New Mexico v. General Electric Co.,* 467 F.3d 1223 (10th Cir.2006). In that case, the plaintiff was not a

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[1] Plaintiffs admit that exceptions 1-5 to §113(h) are inapplicable.

private landowner but instead represented the state's broader sovereign and public trust. Further, and unlike the Plaintiffs' claim here, the claim was pled and characterized by New Mexico not as a common law claim, but instead as "residual to a CERCLA remedy." *Id.* at 1249. New Mexico brought suit because the EPA "abandoned the ROD and required remediation of only the shallowest portion of the total plume." *Id.* New Mexico's claim was, in essence, a CERCLA NRD claim, which is created by the CERCLA statutory scheme and which *is* affected by the CERCLA timing of review provision. In dismissing New Mexico's claim, the *Gen. Elec.* court stated, "[t]his is not to say the State's public nuisance and negligence theories of recovery are completely preempted... Rather, the remedy the state seeks to obtain through such causes of action – an unrestricted award of money damages – cannot withstand CERCLA's comprehensive NRD scheme." *Id* at 1248.

ARCO also relies on *Razore v. Tulalip Tribes of Wash.,* 66 F.3d. 236 (9th Cir. 1995). In *Razore,* the plaintiff formerly operated a landfill on property owned by the defendant tribe. *Id* at 238. The landfill was declared a CERCLA site and Razore was a principal Potentially Responsible Party (PRP) required to pay for the EPA cleanup. *Id.* Prior to the EPA initiating cleanup, Razore sued the tribe, attempting to require the tribe to take immediate remedial action that would, in turn, limit the cost Razore would ultimately be required to pay. *Id.* at 239.

Section 113(h) barred Razore's claim as a challenge to the CERCLA remedy. Because it was not a property owner and was, in fact, responsible for the pollution in the first place, Razore could not sue the tribe under Washington's common law. *Id.* Instead, Razore alleged the tribe's landfill was in violation of the federal

Resource Conservation and Recovery Act (RCRA) and the federal Clean Water Act (CWA). *Id.* Neither RCRA nor CWA could be enforced in that manner by a private party such as Razore. *Id.* Therefore, Razore did not have a cognizable claim that could be preserved by CERCLA's savings provision. *Id* at 240.

ARCO also relies on *McClellan Ecological Seepage Situation v. Perry,* 47 F.3d 325 (9th Cir. 1995). *McClellan* is distinguishable because that case involved a public interest group's suit in federal court seeking to enforce federal environmental regulations. The public interest group alleged that RCRA and CWA were not being complied with during the CERCLA mandated cleanup. *Id.* at 326. The court found that the management plan effectuated by the EPA required compliance with both RCRA and CWA. *Id.* Therefore, a suit alleging that those federal regulations were not being complied with was a challenge to the CERCLA cleanup. *Id.*

The Court does not find ARCO's reliance on these cases persuasive. Further, ARCO's interpretation of §113(h) conflicts with the plain language of the CERCLA savings provision, which states:

> 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...

42 U.S.C. § 9652(d).

The CERCLA statute must be interpreted as a whole. *Montana Sports Shooting Ass'n, Inc. v. State, Montana Dept. of Fish, Wildlife, and Parks,* 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003, 1006. If the statutory language is not clear and unambiguous,

courts look to legislative effect and give effect to the legislative will. *Id.*

The language of §113(h) does not clearly and unambiguously prohibit common law trespass and nuisance claims where the plaintiff seeks restoration damages. Further, to read §113(h) as a prohibition on common law claims for restoration damages creates a possible incongruity with the savings provision, 42 U.S.C. § 9652(d). The legislative history, however, describes the legislative will and intent behind §113(h).

The Congressional Committee of Conference that drafted the 1986 amendments to CERCLA explained that the "[n]ew section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants." H.R. Conf. Rep. No. 99-962, at 224). The Senate agreed to this Committee of Conference Report. *Bernice Samples v. Conoco, Inc.,* 165 F.Supp.2d 1303, 1312 (N.D. Florida, 2001) *citing* 132 CONG. REC. 28, 406, 28, 456 (1986). Senator Stafford "who insisted upon stating expressly what all had agreed was their intent," provided additional explanation of the "purpose and meaning" of the provisions in § 113:

> The time of review of judicial challenges to cleanups is governed by 113(h) for those suits to which it is applicable. It is not by any means applicable to all suits. For purposes of those based on State law, for example, 113(h) governs only those brought under State law which is applicable or relevant and

> appropriate as defined under Section 121.[2] In no case is State nuisance law, whether public or private nuisance, affected by 113(h).

Bernice Samples at 1312 citing 132 CONG. REC. 28, 410. Senator Mitchell echoed Senator Stafford, explaining that "[s]tate nuisance suits would, of course, be permitted at any time." *Bernice Samples* at *Id.* at 1312 citing 132 CONG. REC. at 28, 429.

The House of Representatives also agreed to the Committee Conference Report on the 1986 CERCLA amendments. Representative Glickman clarified the intended interplay between § 113(h) and state law claims such as those maintained by Plaintiffs here:

> Section 113(h) does not affect the ability to bring nuisance actions under State law for remedies within the control of the State courts which do not conflict with the Superfund legislation. The language preserving State nuisance actions in a limited manner is intended to preserve the use of State enforcement authority to compel private party cleanup or to otherwise assure that the State or private party citizens can continue to abate nuisances resulting from hazardous waste disposal when such actions do not conflict with CERCLA.

Bernice Samples at 1314 *citing* 132 CONG. REC. 29, 737 (1986).

Congress' intent in passing §113(h) was, therefore, not to bar claims such as that brought by Plaintiffs in

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[2] This sentence applies to enforcement actions that require state government standards be incorporated and enforced by the EPA in the CERCLA clean-up and is not applicable here.

this case, which do not conflict with CERCLA for the reasons set forth above.

3. CERCLA § 122(e)(6) Does Not Apply to Plaintiffs' Claims.

ARCO also argues that Plaintiffs are barred from pursuing their state law claim for restoration damages by CERLA's "inconsistent response" action section (§ 122(e)(6)). ARCO submits that Plaintiffs are Potentially Responsible Parties (PRPs), and Plaintiffs' claims for monetary restoration damages qualify as an "inconsistent response" to CERCLA. ARCO's argument must be rejected for three reasons.

First, as explained above, CERCLA does not preempt Plaintiffs' common law claims for nuisance, trespass, negligence and strict liability. Section 122(e)(6) cannot preclude Plaintiffs from recovering for restoration damages where CERCLA does not preempt Montana's common law.

Second, Plaintiffs, as private landowners, are not PRPs as contemplated by CERCLA. The Site was declared a Superfund site 33 years ago and ARCO has failed to show that any of the Plaintiffs, or any other private landowner in Opportunity or Crackerville have been declared PRPs. The cases cited by ARCO relate to successor liability or contribution situations in which parties have inherited a business or have otherwise become involved in the polluting business, and are subsequently named PRPs.

Third, even if Plaintiffs' had been declared to be PRPs by the EPA, Plaintiffs' state law restoration claims are not "inconsistent with" EPA's final remedy. Therefore, §122(e)(6) does not apply. Under CERCLA § 122(e)(6), Congress only forbade remedial actions by PRPs that are inconsistent with the ROD without EPA's approval. "This provision is to avoid situations

in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." *Interfaith Comm. Org. v. Honeywell Intern, Inc.*, 2007 WL 576343 * 3 *quoting* 132 CONG. REC. S14919 (daily ed. Oct. 3, 1986). This section is part of CERCLA's overall objective to "promptly remediate polluted sites to bring land back to its original uncontaminated condition," and impose liability on "the parties responsible for the polluted condition of the land." *Johnson Controls, Inc. v. Employers Ins. of Wausau,* 665 N.W.2d 257, 273 (Wis. 2003).

Plaintiffs' restoration plan is not inconsistent with the EPA selected remedy, nor would it exacerbate the pollution issue in Opportunity and Crackerville. Plaintiffs seek to remove all of the pollution left on Plaintiffs' personal property by the Anaconda Smelter. "CERCLA sets a floor, not a ceiling." *New Mexico,* 467 F.3d at 1246. As evidenced by the savings provisions, CERCLA contemplates additional state actions for cleanup that may exceed the EPA mandated action for a property. Congress even contemplated the situation where a private party receives funds from a polluter for restoration damages on a site regulated by CERCLA, and precludes that private individual from double recovery of the same costs through a CERCLA action. *See* 42 U.S.C. § 9614(b).

While ARCO suggests that the Plaintiffs' restoration plan would conflict with ongoing EPA investigation and cleanup, it has failed to carry its burden to demonstrate the absence of genuine issues of material fact. According to ARCO's expert and Rule 30(b)(6) designee, Richard Bartelt, prior to the filing of this action, the remediation required by EPA under CERCLA had already been completed by ARCO. As a result of the filing of this lawsuit, ARCO conducted

additional sampling on every Plaintiffs' property, and now acknowledges contamination exceeding the regulatory level for arsenic in soil remains on some of the Plaintiffs' properties. At oral argument, the Court was informed that ARCO plans to remove contaminated soil on twenty-four of the Plaintiffs' properties, however, none of the Plaintiffs will have the entirety of their yards cleaned up. The work began in June, 2016 and is scheduled to be finished before the start of trial in November, 2016. No restoration of groundwater is contemplated.

CONCLUSION

For the foregoing reasons, the Court does not find that the CERCLA provisions raised by ARCO should bar Plaintiffs from the recovery of restoration damages.

IT IS HEREBY ORDERED that Defendant Atlantic Richfield Company's Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA is DENIED and Plaintiffs' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th -13th) is GRANTED.

DATED, this 30th day of August, 2016.

/s/ Katherine M. Bidegaray
Hon. Katherine M. Bidegaray
DISTRICT COURT JUDGE

APPENDIX C

OP 16-0555

IN THE SUPREME COURT OF THE
STATE OF MONTANA

[Filed 12/09/2016]

ATLANTIC RICHFIELD COMPANY

Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY, THE HONORABLE
KATHERINE M. BIDEGARAY

Respondent,

UNITED STATES' AMICUS BRIEF

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STATEMENT OF THE CASE

In an October 5, 2016, order this Court invited the United States Environmental Protection Agency (EPA) to file this *amicus* brief, addressing whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) bars or otherwise prevents a claim for restoration damages under Montana law that a group of 98 landowners has filed against the Atlantic Richfield Company (ARCO).

STATEMENT OF ISSUES

Does CERCLA bar the landowners' claim for restoration damages?

STATEMENT OF FACTS

The United States relies on ARCO's November 17, 2016 brief to set out the primary factual and procedural background. In addition, however, we note that though EPA has been actively responding to hazardous-substance contamination at the Site for more than 30 years, significant work remains. This includes cleanup of an additional 1,150 residential yards, revegetation of 7,000 acres of upland soils, and removal and closure of waste areas, stream banks, and railroad beds. Final Residential Soils Report, August 7, 2015, available at https://semspub.epa.gov/src/document/08/1549208; Fifth Five-Year Review (Sept. 25, 2015), Table 10-1 at 10-7 https://semspub.epa.gov/src/document/08/1549381. EPA estimates that ARCO will complete this work by approximately 2025, though monitoring and maintenance work will continue indefinitely. Fifth Five-Year Review, Table 10-7 at 10-58.

Response actions at two of EPA's five Operable Units (OUs) directly impact the landowners' property: Community Soils (CSOU), which primarily addresses residential yards contaminated with arsenic and lead

in Anaconda, Opportunity, and the surrounding area; and Anaconda Regional Water, Waste, and Soils (ARWWS OU), which addresses a variety of soil, surface water, and groundwater contamination issues throughout the Site. *See generally* Record of Decision, Community Soils Operable Unit, Sept. 1996, CSOU ROD; *see also* Record of Decision, ARWWS OU, Sept. 1998 (ARWWS OU ROD).[1] EPA considered construction of an underground Permeable Reactive Barrier (PRB), similar to the barrier proposed by the landowners, along Willow Creek for collecting and treating groundwater south of Opportunity to protect surface water in Willow Creek to the south and east of Opportunity. ARWWS OU ROD Am. § 6.4.2.1; ARWWS OU ROD Am. Responsiveness Summary § 3.0. EPA concluded, however, that this approach would not necessarily achieve the human health standard in Willow Creek and would not eliminate exceedances of arsenic in downstream receiving waters. *Id.* § 6.4.3.1 & Responsiveness Summary § 3.0. EPA also determined that it was technically impracticable to reduce arsenic concentrations below 10 ppb in shallow groundwater in the South Opportunity aquifer. *Id.* § 6.4.1. EPA therefore did not select below-ground structures to address groundwater arsenic concentrations.

STANDARD OF REVIEW

EPA adopts the Standard of Review set out in Petitioner's brief.

SUMMARY OF ARGUMENT

In CERCLA, Congress narrowly circumscribed when and how to challenge an EPA-selected remedy and provided EPA with authority to review and

[1] The ARWWS OU ROD is available at http://goo.gl/DWzlpF.

approve remedial actions undertaken by potentially responsible parties to ensure that contaminated sites are cleaned up efficiently and without delay. Specifically, CERCLA section 113(h) bars "any challenges" to a removal or remedial action selected under CERCLA section 104. *See* 42 U.S.C. §§ 9604, 9613. The landowners' restoration-damages claim challenges EPA's selected response actions at the Site because the landowners would require different cleanup standards and actions for soil cleanup, and require installation of underground groundwater barriers, which could undermine EPA's cleanup approaches. Section 113(h) prohibits this claim because it would impose different response actions than those selected by EPA.

Additionally, the doctrine of conflict preemption independently bars ARCO's restoration-damages remedy. Congress delegated the President authority to set cleanup levels and select response actions. Implementing the landowners' restoration-damages remedy would undermine Congress's approach, and aspects of the landowners' proposed remedy conflict with EPA's response action. Because Congress intended to supersede these types of non-federal remedies, the doctrine of conflict preemption bars the landowners' proposed cleanup.

Even if these principles did not bar the landowners' claim, CERCLA section 122(e)(6), 42 U.S.C. § 9622(e)(6), requires EPA authorization of any remedial action at a CERCLA site by potentially responsible parties where, as here, EPA has already initiated a remedial investigation and feasibility study. The landowners own property at the Site, and the District Court did not properly assess whether the landowners are potentially responsible parties under CERCLA. It is likely that some, if not all, of the landowners are potentially responsible parties. No landowner has sought EPA

approval to undertake any remedial action at the Site. EPA is unlikely to approve the landowners' approach, and no court should assume that the landowners' proposed remedy could be implemented. Thus, the landowners' proposed remedy is not a reliable basis for an award of restoration damages.

ARGUMENT

Over the course of more than three decades, EPA has invested millions of dollars in agency resources and thousands of hours of employee time, and has required ARCO to spend hundreds of millions more characterizing the Site, developing RODs, and cleaning the Site. The remedy-selection process continues to respond to public concerns and new data. For example, EPA significantly amended the RODs in 2011 and 2013 based on new information. The remedy-selection and implementation processes account for a wide range of technical, scientific, and community concerns.

EPA's responsibility is to protect human health and the environment based on sound science. It is vital that cleanups proceed expeditiously once EPA selects a remedy. Congress was concerned that consideration of the same broad interests that make for a robust remedy-selection process should not work to prevent EPA's selected remedy from moving forward.

Congress included statutory provisions such as CERCLA's section 113(h), 42 U.S.C. § 9613(h), and section 122(e), 42 U.S.C. § 9622(e), to ensure that an EPA-selected cleanup moves forward without obstruction, delay, and the diversion of resources accompanying judicial challenge and litigation-based additional cleanup requirements and expenses. No matter how well intentioned, any attempt to impose conflicting

cleanup standards and response actions is prohibited by CERCLA.

I. Section 113(h) of CERCLA Prohibits the Landowners' Claim for Restoration Damages.

Under Montana law, restoration damages redress an injury to property, and may exceed the diminution in market value of property caused by the particular injury. *See Lampi v. Speed*, 261 P.3d 1000, 1004 ¶ 21 (Mont. 2011); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086-88 ¶¶ 28-31, 38 (Mont. 2007). To prevent a windfall, Montana requires a plaintiff asserting a claim for restoration damages to show that any award of such damages will actually be used to abate the injury. *Sunburst*, ¶ 40-43; *Lampi*, ¶ 31. The landowners' claim for restoration damages poses a prohibited challenge because it would (1) impose more stringent cleanup levels, (2) impose additional requirements, and (3) require approaches to groundwater remediation and soil disposal that directly conflict with EPA's ROD.

A. The Landowners' Restoration Damages Claim Is an Impermissible Challenge to EPA's Ongoing Cleanup of the Anaconda Smelter Site.

The section 113(h) bar applies to any claims that in their effect "challenge[] any removal or remedial action selected under section 9604 of this title" or seek "to review any order under section 9606(a) of this title." 42 U.S.C. § 9613(h). The Ninth Circuit has found this language to be "clear and unequivocal," and "amount[ing] to a blunt withdrawal of ... jurisdiction" for "any challenges" to an ongoing CERCLA response action, including any attempt to interfere with, strengthen, or control the cleanup or remedy. *McClellan Ecological Seepage Situation*, 47 F.3d 325, 328 (9th

Cir. 1995) (internal citations omitted). Congress chose to prioritize expeditious cleanup of hazardous substances and to ensure that litigation would not interfere with such cleanup actions.

The District Court here held that the restoration-damages claim could proceed to trial because a claim challenges EPA's cleanup "*only* if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup." August 30 Slip Op. at 9 (emphasis added) (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000)). This holding is erroneous, mischaracterizes Ninth Circuit law, and reflects an overly narrow view of section 113(h). In the case cited by the District Court, *ARCO Environmental Remediation*, the Ninth Circuit held only that a claim regarding the right to access public information about a cleanup was not a "challenge" because that claim was not, in any way, related to the goals of the challenged cleanup. *Id.* The Ninth Circuit did not hold that termination or delay was *necessary* to trigger section 113(h). Rather, it recognized, in dicta, that termination or delay of an EPA-mandated cleanup was *sufficient* to trigger the section 113(h) bar.[2] *See* 213 F.3d at 1115.

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[2] Section 113(h) states that "[n]o Federal court shall have jurisdiction ... under State law ... to review any challenges to removal or remedial action ...." 42 U.S.C. § 9613(h) (emphasis added). The landowners did not argue in district court that section 113(h) is inapplicable to state courts, but state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim. CERCLA section 113(b) gives "the United States district courts" "exclusive original jurisdiction over all controversies arising under [CERCLA] ...." *Id.* § 9613(b). The Ninth Circuit has explained that section 113(h) speaks in terms of actions brought in federal courts because Congress required CERCLA controversies be litigated in federal courts. *See Fort Ord Toxics Project, Inc. v. Cal. EPA,* 189 F.3d

The District Court should have dismissed the restoration-damages claim. Most courts have correctly concluded that any suit that will "impact the implementation" of the government's selected CERCLA response action constitutes a "challenge" within the meaning of section 113(h). *See Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990). While Congress did not intend to bar all state-law claims related to hazardous substances, *see New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243-44 (10th Cir. 2006) (citing cases), many courts have correctly found that Congress did intend to bar attempts to apply *any* law that even indirectly works to control, alter, or interfere with an EPA-selected remedy, or that otherwise affects the goal of the remedy. *See McClellan*, 47 F.3d at 330. Even claims that purport to strengthen EPA's selected remedy are barred. *Id.; see also United States v. City & County of Denver*, 100 F.3d 1509, 1513-14 (10th Cir. 1996) (zoning requirements barred); *Town of Acton v. W.R. Grace Co.*, No. 13-12376—DPW, 2014 WL 7721850 (D. Mass. Sep. 22, 2014) (municipal groundwater cleanup standards barred).

A "challenge" includes actions that are "related to the goals of the cleanup." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Courts have even barred claims seeking to enforce other federal laws and state laws that attempt to supplement EPA's CERCLA remedy. *See, e.g., Diamond X Ranch, LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1021 (D. Nev. 2014). The Ninth Circuit has made clear that the prohibition of section 113(h) applies equally to both federal and state actions because "Congress did not intend to preclude dilatory litigation in federal courts

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828, 832 (9th Cir. 1999); *see also O'Neal v. Dep't of the Army*, 742 A.2d 1095, 1100-01 (Pa. Super. Ct. 1999).

but allow such litigation in state courts." *Fort Ord*, 189 F.3d at 832; *see also ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *McClellan*, 47 F.3d at 328; 42 U.S.C. § 9613(b).

In *McClellan*, the Ninth Circuit ruled that a suit seeking to impose additional reporting requirements would "second-guess" EPA's determination and interfere with the remedial action selected, and was accordingly barred by section 113(h). 47 F.3d at 329-30. Similarly, in *Razore*, the court held that section 113(h) barred the plaintiffs' claims regarding EPA's cleanup of a former landfill, which amounted to an "attempt to dictate specific remedial actions and to alter the method and order for cleanup." 66 F.3d at 239-40; *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220-23 (9th Cir. 2013); *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995); *ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *Villegas v. United States*, 926 F. Supp. 2d 1185, 1196 (E.D. Wash. 2013) ("CERCLA's broad jurisdictional bar applies to any suit that challenges any aspect of a CERCLA removal or remediation action, regardless of whether the suit purports to be based on CERCLA."). Other circuits have reached similar holdings. The Tenth Circuit held that a state public-nuisance and negligence suit seeking an unrestricted award of money damages was barred by section 113(h). *New Mexico*, 467 F.3d at 1249-50; *see also Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002); *Cannon v. Gates*, 538 F.3d 1328, 1335-36 (10th Cir. 2008).

The District Court incorrectly distinguished the Tenth Circuit's decision by drawing a distinction between common-law and statutory claims. Aug. 30 Slip Op. at 10. But CERCLA section 113(h) does not

focus on the nature of the underlying cause of action. Rather, it requires courts to assess the impact of the non-federal remedy (here, the restoration-damages claim) to determine if that remedy poses a prohibited "challenge." *See* 42 U.S.C. § 9613(h). *New Mexico*, along with *McClellan*, *Razore*, and the other cases cited above, shows how courts have assessed what constitutes a prohibited challenge. While many common-law claims survive, the express statutory language of CERCLA makes clear that no claim survives if it seeks to challenge or has the effect of challenging EPA's ROD.

These readings of the scope of section 113(h) are dictated by the broad language used by Congress. Congress emphatically barred "*any* challenges to removal or remedial action ... in *any* action," 42 U.S.C. § 9613(h) (emphasis added); and the United States Supreme Court recognizes the comprehensive scope of the term "any." *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *see also United States v. James*, 478 U.S. 597, 605 (1986) ("Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction" (emphasis in original)). The sweeping nature of Congress's word choice supports a broad reading of the language of section 113(h).

Legislative history also supports a broad reading of section 113(h). The Chairman of the Senate Judiciary Committee explained:

> The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the actions that are performed by EPA. The section covers all

> issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986). Such an intent to prohibit review of "all lawsuits" under "any authority," and to cover "all issues," supports the conclusion that section 113(h) bars the landowners' challenge to EPA's ROD.

Finally, actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA. *See* 42 U.S.C. § 9622; *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013). The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations.

Importantly, Congress also provided mechanisms to challenge EPA's ROD. Those mechanisms are listed in section 113(h). For example, if the landowners believe that EPA's remedy is not sufficiently protective, they may bring a citizen suit under 42 U.S.C. § 9659. *See id.* § 9613(h)(4). By barring litigation that challenges a cleanup plan, section 113(h) ensures that EPA, state agencies, and potentially responsible parties participating in a cleanup can develop and implement an adequate and fully realized cleanup plan.

B. As a Factual and Practical Matter, Implementing the Landowners' Remedy Will Undermine EPA's Ability to Implement Its Own Remedy.

In the prior section, we address law surrounding the nature of a "challenge" under section 113(h). Here,

we focus on how the landowners' claim impacts EPA's remedy at the Site. Under Montana law, the landowners must use any restoration-damages award to restore the affected properties. It follows that obtaining restoration damages under state law necessarily means implementing a cleanup action different from the one selected by EPA. The landowners' experts take issue with the cleanup standards selected by EPA, seeking to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA. The landowners' experts also proposed actions that differ from those EPA has required, including: (1) excavating to two feet rather than EPA's chosen depth of 18 inches within residential areas; (2) transporting the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA; and (3) constructing a series of underground trenches and barriers for capturing and treating shallow groundwater. The landowners' experts' reports are not detailed, but do indicate that aspects of those plans are a dramatic departure from EPA's ROD requirements. Given the ongoing cleanup at the Site, the landowners bear the burden of showing consistency with section 113(h)—any missing details weigh in favor of dismissing the landowners' claim.

The District Court, disregarding the 1150 properties that remain to be cleaned, appeared to rely heavily on ARCO's representation that the cleanup of the landowners' residential yards will be finished by November 1, 2016, to support its conclusion that the landowners' supplemental restoration requirements will not interfere with ongoing ROD requirements. Aug. 30 Slip Op. at 8. The District Court's conclusion ignores the full impact of permitting the restoration claim to go forward. Allowing individual property owners to divert cleanup resources from the implementation of EPA's

ROD is a direct conflict with EPA's cleanup process. Goals of the CSOU ROD, for example, include minimization of dust transfer, bioavailablity of lead, and soil ingestion. CSOU ROD Am. at II-11. Once the EPA remedy at the landowners' properties is complete, the completed yards are either capped or backfilled with clean soil. *See, e.g.*, CSOU ROD Am. 11-18 – II-19 (setting residential-soils requirements including a "soil swap" and ensuring "replacement with clean soil and a vegetative ... or other protective barrier"). Tearing up that protective cap or layer of soil directly impacts EPA's chosen remedy and could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion. Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public. Even if the landowners attempt to coordinate their efforts with EPA, their involvement would slow the implementation and timeline of EPA's ROD and increase the agency's costs. The District Court's analysis wrongly assumed that the restoration on the Site proposed by the landowners' experts could proceed without risk or consequence. *See* Aug. 30 Slip Op. at 8. Additionally, even if EPA could coordinate with the landowners, recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres.

The landowners' proposal to install underground reactive barriers is plainly inconsistent with EPA's cleanup, and may pose even greater risks. First, it is important to understand that water from domestic wells in the town of Opportunity is generally clean and drinkable, due to natural conditions in the deep underground aquifer accessed by the wells, and to hydraulic controls (a drain-tile system) that intercept arsenic contamination in shallow groundwater beneath the

town of Opportunity. ARWWS ROD Am. at 6.4.1. If conditions change, EPA can take additional actions that it deems appropriate to protect human health and the environment based on what it learns through monitoring. ARWWS ROD Am. at 6.4.5.

By contrast, the landowners would build several underground permeable reactive barriers. Kane Rep., Opinion 4(b), at 10. These barriers, intended to treat shallow groundwater moving toward Opportunity, would be 8,000 feet long, 15 feet deep, three feet wide, and situated upgradient of the town. *Id.* Shorter barriers would be placed upgradient of individual landowners' properties. *Id.* These barriers could change the groundwater flow in unpredictable ways, which could impact current hydraulic controls. The barriers proposed by the landowners' experts contain elements and enzymes that supposedly strip arsenic in water but could unintentionally contaminate groundwater and surface water. *Id.* In other words, the landowners' remedy could upset a balance that currently protects human health and the environment. Additionally, if EPA sampling detects elevated contamination following landowners' installation of underwater barriers, EPA will not be able to determine whether the contamination was impacted by the landowners' project, complicating potential remedial options. If other property owners later filed similar claims and demanded construction of additional structures not envisioned by the ROD the situation becomes even more complex. Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids *ad hoc* addition of potentially competing cleanup measures. The District Court took far too narrow a view of the impact of the scope of a prohibited challenge—looking primarily to whether the landowners "seek to alter the ROD" or

"change any of the requirements that the EPA has imposed upon ARCO." August 30 Slip Op. at 9.

CERCLA cleanups are often iterative in that EPA uses data obtained during the remedial investigation and early monitoring to inform subsequent adjustments to its cleanup plan. *E.g.*, CSOU ROD Am. Part II § 3.0 (describing how data obtained through sampling implemented under the original CSOU ROD led EPA to add lead remediation to its soil cleanup). Lawsuits that seek to impose different or additional remedial actions while a cleanup is in progress not only would result in diversion of limited government resources and delay of EPA's cleanup efforts contrary to Congress's intent, *McClellan*, 47 F.3d at 329, but also would force the parties to litigate the details of a cleanup plan that may not be final.

Not only would the landowners set a new remedial goal for soils (8 ppm for arsenic, compared to the 250 ppm ROD standard), they would achieve their goals through different methods. As in *McClellan*, the landowners' experts advocate remediation levels that are "directly related to the goals" and methods of the cleanup of the Site prescribed by EPA. Section 113(h), however, does not allow the landowners to use their state-court lawsuit to supplement EPA's selected response-action cleanup levels.

C. Section 113(h) Bars the Landowners' Restoration-Damages Claim Irrespective of CERCLA's Savings Clauses.

The District Court relied on CERCLA's savings clauses in holding that section 113(h) did not bar the landowners' restoration-damages claim. Aug. 30 Slip Op. at 5-8. No savings clause, however, shields the landowners' restoration-damages claim. Section 302(d) of CERCLA, which provides in part that

"[n]othing 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," 42 U.S.C. § 9652(d), is not in conflict with section 113(h). As the Ninth Circuit stated in *Razore*, "[t]he temporary bar to citizen enforcement does not change [a potentially responsible party's] 'obligations or liabilities' under other statutes. 66 F.3d at 240. Moreover, reading section 302(d) to govern the interpretation of section 113(h) "would effectively write [section 113(h)] out of the Act," a result that would be contrary to the court's "duty to give effect, if possible, to every clause and word of a statute." *Id.* (alteration in original) (citations omitted). As the Seventh Circuit has pointed out, while "federal environmental laws [were] not intended to wipe out the common law of nuisance," section 302(d) "must not be used to gut provisions of CERCLA." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998).

Two other provisions of CERCLA, sections 114(a) and 310(h), also contain savings provisions, but neither provision trumps the limitations Congress set out in section 113(h). 42 U.S.C. §§ 9614(k), 9659(h). Section 310(h) provides that the statute "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)] of this title*." 42 U.S.C. § 9659(h) (emphasis added). The express language of this savings clause demonstrates the primacy of section 113(h). *See Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012). Section 114(a) likewise contains no language that would overcome the limitations Congress set out in section 113(h). This case presents a perfect example of how these provisions interrelate. CERCLA does not bar all of the

landowners' state-law claims – only the landowners' claim for restoration damages.

II. Principles of Conflict Preemption Independently Bar the Landowners' Restoration-Damages Remedy.

If there is a conflict between federal and state cleanup standards, federal law prevails where it is "a physical impossibility" to comply with both the federal and state mandates, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Where state action conflicts with a CERCLA cleanup, state cleanup standards are preempted. *See City & County of Denver*, 100 F.3d at 1512-14. Even if section 113(h) did not bar the landowners' restoration damages claim, the doctrine of conflict preemption, grounded in the Supremacy Clause, U.S. Const. art. VI, cl. 2, independently bars the landowners" restoration-damages remedy here. *See generally Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015).

In conducting a preemption analysis, two bedrock principles guide the courts: (1) the purpose of Congress; and (2) "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Nation v. City of Glendale*, 804 F.3d 1292, 1298 (9th Cir. 2015) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Congress, in CERCLA, established how EPA should determine the degree of cleanup at a site, including how EPA should consider non-federal standards (such as state standards) in selecting the final cleanup level. *See* 42 U.S.C. § 9621(d). Congress was clear that the President or his

delegates were responsible for remedy selection, after considering state-law cleanup standards and a host of other factors. *See id.* § 9621(a). Allowing the landowners' restoration-damages claim to proceed cannot be reconciled with that congressionally mandated approach for consideration of state and local requirements.

Aspects of the landowners' restoration plan also conflict with EPA's RODs or could make those remedies difficult or impossible to achieve, as discussed more fully in argument section I-B. For example, the landowners' proposed construction of a series of underground barriers could divert groundwater in several areas of concern, which are subject to ongoing groundwater-monitoring efforts under EPA's selected cleanup plan. Additionally, the same excavated soil cannot be transported to EPA-approved onsite repositories, as provided for in the CSOU ROD, and also be transported to Missoula or Spokane, as required in the landowners' restoration plan.[3] This is the type of uncoordinated response that CERCLA section 121(d), 42 U.S.C. § 9621(d), was designed to prevent.

III. Even if Plaintiffs' Claims Were Otherwise Permissible, the Relief They Seek May Be Barred Under CERCLA Section 122(e)(6).

As Congress provided in section 122(e)(6) of CERCLA:

> When either the President, or a potentially responsible party ... has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake

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[3] Even if the landowners deposit excavated soil onsite, that approach would create additional costs for EPA's cleanup.

> any remedial action at the facility unless such remedial action has been authorized by [EPA].

42 U.S.C. § 9622(e)(6). The President has initiated a remedial investigation and feasibility study (RI/FS) for the Anaconda Smelter Site under CERCLA, through EPA securing ARCO's agreement to perform the RI/FS for the various operable units within the Site. Consequently, no PRP may undertake any remedial action at the Site without EPA authorization. *See id* § 9622(e)(6). EPA has not authorized the remedial action the landowners appear to seek in their restoration-damages claim, and therefore neither ARCO nor any landowner PRP may undertake it. Though the landowners seek money damages, those damages presuppose a subsequent remedy that is unauthorized. EPA is unlikely to approve the cleanup proposed by the landowners because that approach is inconsistent with EPA's RODs for the reasons discussed in sections I-A, I-B, and II of this brief. Such a tentative proposal is not a proper basis for a damages award.

CERCLA designates current owners of contaminated property as PRPs, *see* 42 U.S.C. § 9607(a)(1), unless they meet certain requirements, *see id* § 9607(q). The District Court improperly concluded that the landowners need to be somehow "declared PRPs" to be considered a potentially responsible party. Aug. 30 Slip Op. at 15. That conclusion is incorrect, and is untethered to the statutory language. Parties that meet the requirements set out in 42 U.S.C. § 9607(a)(1) are, by definition, potentially responsible parties—regardless of whether they have defenses that could absolve them of liability. Most relevant here are the so-called "third party" and "innocent landowner" defenses, by which a PRP may show that the release of hazardous substances was caused solely

by "an act or omission of a third party," *id.* § 9607(b)(3), or that "the disposal or placement of the hazardous substance" occurred before the PRP acquired the property, *id.* § 9601(35)(A). However, those defenses are defenses to a PRP's liability for cleanup costs. Section 122(e)(6) prohibits PRPs from initiating a remedial action without EPA permission.

The District Court failed to undertake the proper statutory analysis by focusing on whether the landowners were "*potentially* responsible parties." The District Court likewise failed to assess whether any of the 98 landowners qualified as a protected "third party" or "innocent landowner" under the statutory definitions. Thus, the District Court's conclusion that all 98 landowners are not subject to the requirements of CERCLA section 122(e)(6) is fatally flawed.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over, and should dismiss, the landowners' claim for restoration damages.

DECEMBER 8, 2016

MATTHEW R. OAKES
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Message

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Sent: 1/5/2018 3:36:43 PM
To: Benevento, Douglas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93dba0f4f0fc41c091499009a2676f89-Benevento,]; Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: Montana Supreme Court opinion: Christian v Atlantic Richfield
Attachments: Christian v. AR - MT Supreme Court Opinion and Order.pdf; OP 16-0555 Amicus -- Brief.pdf

Doug and Kell,

I hope that you are doing well and had a relaxing break during the holidays.

Last week, the Montana Supreme Court issued the attached decision in the *Christian v Atlantic Richfield* case. The court ruled against Atlantic Richfield and rejected the views expressed by the Department of Justice in the amicus brief that the United States filed in the case. Atlantic Richfield had petitioned the Montana Court to hold that private landowners cannot use state law to require Atlantic Richfield to perform a remedy at the Anaconda NPL site that would be materially different than the clean up program that EPA has directed for over 30 years. As you know, under CERCLA, only the EPA has the authority to determine the remedy for a superfund site.

The Montana Supreme Court's decision opens the door for private landowners in Montana to develop their own remedies and to sue cooperating Potentially Responsible Parties to fund these disparate remedies even if they conflict with the EPA's selected remedy. Not only does this ruling challenge the EPA's authority under CERCLA to determine the appropriate environmental remedy, but it also undermines the integrity of the consent decree process in Montana since the regulated community cannot rely upon the remedy that the EPA selects to implement through a consent decree. A PRP could face an unending litany of conflicting remedies arising from private lawsuits that make it impossible to complete the clean up. This ruling creates a significant policy and legal matter for the EPA.

Atlantic Richfield intends to file a petition for writ of certiorari with the U.S. Supreme Court by the end of March. The Solicitor General will have the opportunity to submit an amicus brief in the U.S. Supreme Court supporting the company, which would be due at the end of April. In addition, the U.S. Supreme Court may request the views of the Solicitor General in response to the company's petition.

Obtaining review by the US Supreme Court is a difficult undertaking. Nonetheless, Atlantic Richfield believes that the case is worthy of Supreme Court review and that Supreme Court review is necessary to protect the interests of the United States. The odds of review would increase significantly if the Department of Justice files an amicus brief in support of Atlantic Richfield's petition for a writ of certiorari.

The United States previously filed an amicus brief in support of Atlantic Richfield in the State court proceeding and made oral arguments before the Montana Supreme Court. The DOJ's amicus brief for the State court proceeding is attached.

I would like to arrange a phone call with you to discuss this case and possible next steps to consider support from the EPA for a Supreme Court review of this matter. I think it would be efficient if the three of us could talk along with our legal advisors.

Let me know if you are open to scheduling a call during the next two weeks. If so, I will work with your assistants to arrange a time.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone **Personal Matters / Ex.**

OP 16-0555

IN THE SUPREME COURT OF THE STATE OF MONTANA

2017 MT 324

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE HON. KATHERINE M. BIDEGARAY,

Respondent,

ORIGINAL PROCEEDING: Petition for Writ of Supervisory Control
District Court of the Second Judicial District,
In and for the County of Silver Bow,
Cause No. DV-08-173BN
Honorable Katherine M. Bidegaray, Presiding Judge

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Clerk

OPINION AND ORDER

Justice James Jeremiah Shea delivered the Opinion and Order of the Court.

¶1 Petitioner Atlantic Richfield Company ("ARCO") petitioned this Court for a writ of supervisory control, seeking reversal of five orders of the Second Judicial District Court in Silver Bow County in the matter of *Christian, et al. v. Atlantic Richfield Co.* Relevant to the issue before us, the action in the District Court concerns a claim for restoration damages brought by property owners in and around the town of Opportunity, Montana (hereafter referred to as "Property Owners"). We accepted supervisory control of this case for the limited purpose of considering the District Court's August 30, 2016 Order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th). We restate the issues as follows:

> *Issue One: Whether the Property Owners' claim constitutes a challenge to EPA's selected remedy, and thus does not comply with CERCLA's timing of review provision.*
>
> *Issue Two: Whether the Property Owners are "Potentially Responsible Parties," and thus cannot proceed with their chosen restoration activities without EPA approval.*
>
> *Issue Three: Whether the Property Owners' claim otherwise conflicts with CERCLA, and is thus preempted.*

PROCEDURAL AND FACTUAL BACKGROUND

¶2 The Anaconda Smelter, originally constructed by the Anaconda Copper Mining Company, processed copper ore from Butte for nearly one hundred years before shutting

down in 1980. Also in 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, et seq. Also known as "Superfund," the purpose of CERCLA is to foster the cleanup of sites contaminated by hazardous waste, and to protect human health and the environment. In 1983, the Environmental Protection Agency ("EPA") designated the area impacted by the Anaconda Smelter, now owned by ARCO, as a Superfund site. In 1984, EPA issued an administrative order requiring ARCO to begin a remedial investigation at the Smelter Site. In 1998, EPA selected a remedy pursuant to CERCLA that detailed ARCO's cleanup responsibilities moving forward.

¶3 As part of ARCO's cleanup responsibility, EPA required ARCO to remediate residential yards within the Smelter Site harboring levels of arsenic exceeding 250 parts per million in soil, and to remediate all wells used for drinking water with levels of arsenic in excess of ten parts per billion. The Property Owners, a group of ninety-eight landowners located within the bounds of the Smelter Site, sought the opinion of outside experts to determine what actions would be necessary to fully restore their properties to pre-contamination levels. The experts recommended the Property Owners remove the top two feet of soil from affected properties and install permeable walls to remove arsenic from the groundwater. Both remedies required restoration work in excess of what the EPA required of ARCO in its selected remedy.

¶4 The Property Owners filed this action in 2008, claiming common law trespass, nuisance, and strict liability against ARCO, and seeking restoration damages. Any

recovered restoration damages are to be placed in a trust account and distributed only for the purpose of conducting restoration work.

¶5 In 2013, ARCO moved for summary judgment on the grounds that CERCLA barred the Property Owners' claims. The District Court did not address ARCO's CERCLA preemption issue because it dismissed the Property Owners' case on the basis that their claims were barred by the statute of limitations. The Property Owners appealed and we affirmed in part, reversed in part, and remanded the case to the District Court for further proceedings. *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 79, 380 Mont. 495, 358 P.3d 131. On remand, the District Court denied all of ARCO's contested motions for summary judgment. Among the orders denied was ARCO's Motion for Summary Judgment on the Property Owners' Claim for Restoration Damages as Barred by CERCLA. ARCO petitioned this Court for a writ of supervisory control, asking us to vacate four of the District Court's orders denying summary judgment and one order on a motion in limine. On October 5, 2016, we issued an order granting the writ for the limited purpose of considering the District Court's 2016 Order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th).

¶6 The Property Owners bring several claims against ARCO: (1) injury to and loss of use and enjoyment of real and personal property; (2) loss of the value of real property; (3) incidental and consequential damages, including relocation expenses and loss of rental income and/or value; (4) annoyance, inconvenience, and discomfort over the loss and

prospective loss of property value; and (5) expenses for and cost of investigation and restoration of real property. ARCO concedes that the Property Owners may move forward on their first four claims, but contend that the claim for restoration damages is preempted by CERCLA.

STANDARD OF REVIEW

¶7 We review de novo a district court's grant or denial of summary judgment, applying the same criteria of M. R. Civ. P. 56 as a district court. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. Under Rule 56(c), judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (citation omitted).

DISCUSSION

¶8 In *Sunburst School Dist. No. 2 v. Texaco*, 2007 MT 183, ¶ 34, 338 Mont. 259, 165 P.3d 1079, we held: "If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation." To recover restoration damages, a plaintiff must show (1) the injury to the property is reasonably abatable, and (2) the plaintiff has "reasons personal" for seeking restoration damages. *Lampi v. Speed*, 2011 MT 231, ¶ 29, 362 Mont. 122, 261 P.3d 1000 (citing *Sunburst*, ¶¶ 31–39). In *Sunburst*, the plaintiffs sought restoration damages from Texaco to restore their properties to the condition the properties would have been in absent

a benzene leak from a Texaco gasoline refinery. *Sunburst*, ¶ 38. Texaco argued that the plaintiffs' common law claim for restoration damages was preempted by Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), a state statute similar in purpose and scope to CERCLA. *Sunburst*, ¶ 55. We further noted in *Sunburst* that "[a] presumption exists against statutory preemption of common law claims. A statute does not take away common law claims except to the extent that the statute expressly or by necessary implication declares." *Sunburst*, ¶ 51 (internal citations omitted). Accordingly, we held: "[N]o conflict exists between DEQ's supervisory role under CECRA and restoration damages awarded under the common law. We further conclude that nothing in CECRA precludes a common law claim by necessary implication." *Sunburst*, ¶ 59.

¶9 ARCO argues that the Property Owners may not bring their state law claim for restoration damages because the claim conflicts with various provisions of CERCLA, and thus are preempted. Preemption is established expressly, through the unambiguous language of Congress in statute, or impliedly through the doctrines of field preemption or conflict preemption. *Oneok, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S. Ct. 1591, 1594–95 (2015). Field preemption exists if Congress intended the relevant federal law to entirely occupy the field. *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 109 S. Ct. 1661, 1665 (1989). There is no field preemption in this case, as CERCLA expressly allows for complementary state laws, including common law, through a series of savings clauses:

> Nothing 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).

> Nothing 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).

¶10 ARCO advances three arguments regarding how it contends CERCLA bars the Property Owners' claim for restoration damages: (1) Property Owners' restoration damages claim constitutes a direct challenge to EPA's selected remedy and CERCLA's timing of review provision, 42 U.S.C. § 9613(h) ("CERCLA § 113(h)"), prevents this Court from hearing challenges to an EPA remedy; (2) the Property Owners are "potentially responsible parties" under CERCLA, and as such may not perform any restoration activities without EPA approval; and (3) the Property Owners' claim otherwise conflicts with CERCLA and is barred under the doctrine of conflict preemption. We address each of these arguments in turn.

¶11 *Issue One: Whether the Property Owners' claim constitutes a challenge to EPA's selected remedy, and thus does not comply with CERCLA's timing of review provision.*

¶12 ARCO cites CERCLA's "timing of review" provision, § 113(h), for the proposition that CERCLA expressly preempts the Property Owners' claim by denying Montana courts jurisdiction over any challenges to a CERCLA cleanup. Section 113(h) reads, in relevant part:

> 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 of § 9604 of this title, or to review any order issued under section § 9606(a) of this title. . . .

At the outset, it bears noting that this statute begins: "No *Federal* court shall have jurisdiction under *Federal* law . . . ." (Emphasis added). Conspicuously absent is any reference to state court jurisdiction over state law claims. It is well-established that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA.

¶13 ARCO relies on a Ninth Circuit Court of Appeals case in which the Ninth Circuit read § 113(h) together with § 113(b) to conclude that Montana state courts lack jurisdiction over any claims that "constitute 'a challenge to a CERCLA cleanup.'" *ARCO Envtl. Remediation, LLC v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000). The Ninth Circuit concluded that because § 113(b) grants federal courts "exclusive original jurisdiction over all controversies arising under [CERCLA]," it interpreted § 113(h)'s reference to "challenges to removal or remedial action" to be a "controversy arising under [CERCLA]," and thus exclusively within the jurisdiction of the federal courts. *ARCO Envtl. Remediation*, 213 F.3d at 1115.

¶14 Irrespective of this jurisdictional question, however, ARCO acknowledges that its argument for conflict preemption under § 113(h) turns on whether the Property Owners' claim for restoration damages "challenges" the CERCLA cleanup. We have not previously addressed what constitutes a "challenge" within the context of § 113(h). In *ARCO Environmental Remediation* the Ninth Circuit defined a "challenge" as a claim that "is

related to the goals of the cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115. More specifically, the Ninth Circuit further held that a "challenge" was any action in which a party seeks "to dictate specific remedial actions; to postpone the cleanup; to impose additional reporting requirements on the cleanup; or to . . . alter the method and order of cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115 (internal citations omitted). Another definition comes from the Southern District of Indiana. In *Taylor Farm Ltd. Liab. Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 974–75 (S.D. Ind. 2002), the Indiana District Court rejected the defendant's proposed definition of a challenge as being anything more comprehensive than the EPA-selected remedy. The Court held:

> [T]he only sense in which Taylor's lawsuit can be said to "challenge" Viacom's settlement agreement with the EPA is that, if Taylor is successful, Viacom will be required to spend more money to clean up the land for Taylor's benefit than the EPA required Viacom to spend for the public's benefit.

Taylor Farm, 234 F. Supp. 2d at 976. Yet another interpretation comes from *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1315–16 (N.D. Fla 2001), in which the Florida District Court concluded the plaintiffs' claim was not a "challenge" under § 113(h), because:

> [It] is not an action designed to review or contest the remedy selected by the EPA prior to implementation; it is not an action designed to obtain a court order directing the EPA to select a different remedy; it is not an action designed to delay, enjoin, or prevent the implementation of a remedy selected by the EPA; and it is not a citizen suit brought pursuant to 42 U.S.C. § 9659.

Still other interpretations come from the Third Circuit in *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019, 1024 (3rd Cir. 1991) (holding a claim is a challenge only if it "would interfere" with or "delay[] the prompt cleanup" of hazardous sites); and the District of New

Mexico in *Reynolds v. Lujan*, 785 F. Supp. 152, 154 (D.N.M. 1992) (holding a claim is a challenge if it would require the court to "alter the [EPA's] ongoing response activities.").

¶15 Synthesizing the various interpretations of what constitutes a "challenge" in light of the nature of the Property Owners' claim and CERCLA's savings clauses evinces that, fundamentally, 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. At a minimum, a "challenge" must be more than merely requiring ARCO to spend more money to clean up the land for the Property Owners' benefit, as the court in *Taylor Farm* noted. In this case, the restoration damages Property Owners seek are to be placed in a trust account and used to further restore affected properties beyond the levels required by the EPA, and the restoration work would be completed by the Property Owners themselves. To the extent that EPA's work is ongoing, the Property Owners are not seeking to interfere with that work, nor are they seeking to stop, delay, or change the work EPA is doing. The Property Owners' claim is exactly the sort contemplated in CERCLA's savings clauses, and does not present a "challenge" to EPA's selected remedy. Absent a "challenge" to removal or remedial action selected in the CERCLA cleanup process, §§ 113(h) and (b) do not deprive Montana courts of jurisdiction to entertain state-law restoration claims.

¶16 Despite ARCO's efforts to overcomplicate this matter and recast what is, at its essence, a common law claim for damages into a challenge to EPA's cleanup, the fundamental issue before us is one of timing. Specifically, when can private landowners bring a state common law claim for restoration damages for the purpose of cleaning up their own private property? The Dissent maintains that any such claim, if it relates to the

goals of the cleanup, must wait until the EPA has completed its work and moved on because CERCLA "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." Dissent, ¶ 48, quoting *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (hereinafter referred to as *MESS*) (emphasis in original). Even by the Dissent's analysis, though, the Property Owners' claim does not constitute a challenge to EPA's plan. The Dissent cites a litany of cases from other jurisdictions in ostensible support of the contention that the Property Owners' damage claim constitutes a challenge to EPA's remediation plan. Dissent, ¶ 44. These cases are inapposite to the Property Owners' claim presently before us. None of the cases cited by the Dissent, nor any of the cases cited by ARCO or the United States, involve a claim by private property owners, against another private party, seeking money damages for the purpose of restoring their own private property. The Property Owners are not asking the Court "to dictate specific remedial actions." The Property Owners are not asking the Court to "impose additional reporting requirements on the cleanup." The Property Owners are not asking the Court to "terminate the Remedial Investigation/Feasibility Study (RI/FS) and alter the method and order of cleanup." Nothing in the Property Owners' claim for restoration damages "stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA," unless Congress's objective was to condemn, in perpetuity, the private property of an individual property owner because that property happened to have been contaminated by a third party.

¶17 Put simply, the Property Owners are not asking the Court to interfere with the EPA's plan. The Property Owners are 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 whatsoever. The Property Owners are simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan. If the jury awards restoration damages, those damages will be placed in a trust for the express purpose of effectuating the Property Owners' restoration plan. Indeed, any restoration will be performed by the Property Owners themselves and will not seek to force the EPA to do, or refrain from doing, anything at the Site.

¶18 The Dissent contends that § 113(h) requires rejecting claims that challenge EPA's *ongoing* remedial action. Dissent, ¶ 43. What, if any, actual remedial action remains ongoing is, at least, unclear. Even assuming there is something that would constitute ongoing remedial action, however, this still does not morph the Property Owners' claim for restoration damages—for purposes of funding an eventual restoration according to the Property Owners' plan—into a challenge to EPA's cleanup. As Justice Baker notes in her concurrence, the United States' counsel acknowledged during oral argument that some aspects of the Property Owners' restoration plan would not constitute a "challenge" within the meaning of the law. Concurrence, ¶ 32. As to other aspects of the Property Owners' restoration plan, even the federal government has to pull up stakes at some point and leave these private property owners alone to attend to their own private property. If the Property Owners must wait for that eventuality to conclude their restoration plan, the history of this case amply demonstrates that they have the patience for it.

¶19 Whether or not the Property Owners succeed on their claim for restoration damages will not affect, alter, or delay EPA's work in any fashion. Likewise, EPA's work, whether

ongoing or not, has no bearing on the success or failure of the Property Owners' claim for restoration damages on the merits. In *Sunburst*, we noted "that CECRA's focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law." *Sunburst*, ¶ 59. The same reasoning applies here: CERCLA's regulatory standards do not apply to the common law claim at issue. The District Court has already recognized this fact when it granted the Property Owners' motion in limine to preclude ARCO from presenting evidence regarding its compliance with EPA requirements, and correctly noted that allowing such evidence at trial "pose[d] the clear risk for ARCO to 'cloak itself' in the authority of the federal government." *See Sunburst*, ¶¶ 107, 121 (discussing Texaco's efforts to cloak itself in the authority of the State of Montana in order to create confusion). That being noted, nothing in our holding here should be construed as precluding ARCO from contesting the Property Owners' restoration damages claim on its own merits, just as it may contest the Property Owners' other claims.

¶20 The Property Owners' claim for restoration damages in this case arises solely under state common law, and does not implicate federal law or cleanup standards. The Property Owners are not seeking to compel EPA to do, or refrain from doing, any action. Therefore, the Property Owners' claim does not implicate § 113(h), nor does it implicate § 113(b). *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1455 (6th Cir. 1991) ("Clearly preserved [by § 113(h)], are challenges to the selection or adequacy of remedies based on state nuisance law . . . independent of federal response action.").

¶21 *Issue Two: Whether the Property Owners are "Potentially Responsible Parties," and thus cannot proceed with their chosen restoration activities without EPA approval.*

¶22 ARCO argues that under 42 U.S.C. § 9622(e)(6) ("CERCLA § 122(e)(6)"), the Property Owners are "Potentially Responsible Parties" ("PRP"), and are thus prohibited from conducting any remedial action that is inconsistent with EPA's selected remedy without EPA's consent. There are several categories of PRPs. For purposes of our analysis, however, the only relevant category is a class consisting of all current owners of property at a CERCLA facility. 42 U.S.C. § 9607(a)(1).

¶23 Designation as a PRP may occur in one of three ways: (1) if the party has entered into a voluntary settlement with the EPA; (2) upon a judicial determination that the party is a responsible party; or (3) if the party is currently a defendant in a CERCLA lawsuit and has been found not to be entitled to statutory defenses. *Taylor Farm*, 234 F. Supp. 2d at 966–71 (citing *Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.*, 142 F.3d 769, 773, n.2 (4th Cir. 1998) and *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120, n.2 (3d Cir. 1997)). The statutory defenses relevant to the Property Owners are the "innocent landowner" defense and the "contiguous landowner" defense. 42 U.S.C. § 9607(b)(3), (q).

¶24 ARCO argues that a PRP is a strictly defined category, subject to liability even if the PRP did not cause or contribute to the contamination. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956–57 (9th Cir. 2013). ARCO also contends that even if the Property Owners were able to avail themselves of a defense to liability for cleanup costs, they would still meet the broader definition of PRP, and be bound by § 122(e)(6).

Essentially, ARCO asks us to treat the Property Owners as PRPs under § 122(e)(6), even though they have never been treated as PRPs for any purpose—by either EPA or ARCO—during the entire thirty-plus years since the Property Owners' property was designated as being within the Superfund site. As the Property Owners correctly point out, the statute of limitations for such a claim (at most six years from the date cleanup work was initiated) has long passed. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010). Put simply, the PRP horse left the barn decades ago.

¶25 The Property Owners have never entered into a voluntary settlement with the EPA. There has never been a judicial determination that the Property Owners are responsible parties. The Property Owners are not currently, nor have they ever been, defendants in a CERCLA lawsuit in which they were found not to be entitled to statutory defenses. The EPA has not included the Property Owners as a defendant in the legal proceedings in this matter, nor have they been party to any settlement agreements regarding cleanup proceedings. Despite the EPA never engaging the Property Owners as PRPs, ARCO now asks us to treat the Property Owners as PRPs—for the first time in these proceedings—solely for the purpose of using § 122(e)(6) to bar their claim for restoration damages. We decline to do so.

¶26 *Issue Three: Whether the Property Owners' claim otherwise conflicts with CERCLA, and is thus preempted.*

¶27 ARCO's final argument is that other conflicts exist between CERCLA and the Property Owners' claim for restoration damages. ARCO proffers three lines of reasoning for this argument. First, ARCO argues that the EPA has sole authority to select

environmental remedies at Superfund sites, which would preclude alternative standards and remedies. To adopt this reasoning would be to ignore CERCLA's savings clauses. As stated above, CERCLA's savings clauses expressly contemplate the applicability of state law remedies. 42 U.S.C. §§ 9614(a), 9652(d). Second, ARCO contends there is an "unambiguous congressional intent to foreclose any state law remedy that challenges or obstructs EPA's remedy at a Superfund site." This argument fails for the same reason that § 113(h) does not apply: the Property Owners' claim does not prevent the EPA from accomplishing its goals at the ARCO Site. Lastly, ARCO again characterizes the Property Owners' claim as a challenge to EPA's selected remedy, and argues that the claim cannot proceed until EPA's remedy is fully performed. Yet CERCLA's savings clauses operate to preserve the Property Owners' ability to pursue this claim. 42 U.S.C. § 9652(d) ("*Nothing* 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." (emphasis added)). CERCLA does not expressly or impliedly preempt the Property Owners' claim for restoration damages in this matter.

CONCLUSION

¶28 We conclude that the District Court did not err by Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th). To be clear, ARCO is not

precluded from contesting the merits of the Property Owners' restoration plans. However, that is an issue of fact to be resolved at trial.

¶29 THEREFORE, IT IS ORDERED:

¶30 The District Court's order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th) is AFFIRMED. This matter is remanded to the District Court for further proceedings consistent with this Opinion.

DATED this 29th day of December, 2017.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ JAMES MANLEY
Sitting for Chief Justice Mike McGrath
/S/ JOHN KUTZMAN
Sitting for Justice Jim Rice
/S/ MICHAEL E WHEAT
/S/ DIRK M. SANDEFUR

Justice Beth Baker, specially concurring.

¶31 I understand the Court's decision today to be a narrow one: CERCLA does not, as a matter of law, preempt all common-law claims for restoration damages to the property of a private individual. I agree with that conclusion and with the decision not to treat the Property Owners as PRPs. I thus concur with the Court's ruling that the District Court did not err in denying ARCO's motion for summary judgment on the restoration damages

claims. I appreciate the Dissent's thorough analysis of CERCLA § 113(h), but do not agree that it applies to foreclose the Property Owners' claims.

¶32 It became clear during oral argument in this case that the parties dispute whether aspects of the Property Owners' proposed restoration plan would conflict with actions ARCO has taken in the Superfund cleanup effort. ARCO's counsel characterized the dispute as one of jurisdiction, which empowers the trial court to determine underlying facts. Here, the trial court determined, for conflict preemption purposes, that the Property Owners' claims did not stand as an obstacle to the CERCLA cleanup underway or impede EPA's requirements on the site. Amicus curiae the United States argues that the purpose of CERCLA is to assure that EPA coordinates the cleanup between multiple stakeholders, so that the selected plan may move forward without obstruction, delay, or the diversion of resources that would accompany multiple individual plans and proposals. The government stresses that state-court lawsuits cannot, under § 113(h), supplement EPA's selected response-action cleanup levels if such a proposed plan challenges or conflicts with EPA's proposed remedy. The government recognizes, though, that CERCLA does not bar all state-law claims by affected landowners, and its counsel acknowledged during oral argument that some aspects of the Property Owners' plan would not be a "challenge" within the meaning of the law. The Property Owners' counsel protested during argument that it was the first time they had heard that some aspects of their plan would "undo" what already has been done, and that in nine years of litigation no evidence had been presented to the District Court that the Property Owners' plan conflicted with EPA's remedy.

¶33 The large-scale environmental remediation projects made possible by CERCLA are intended, and are essential, to clean up severe widespread contamination resulting from decades of historic mining practices that left expansive deposits of toxic tailings and particulate fallout in floodplains, ranchlands, and soils. The massive cleanup efforts in which ARCO, EPA, and the State of Montana have engaged for more than thirty years have gone far to remediate the Superfund site. But CERLCA draws a distinction between remedial action and damages for injury to, destruction of, or loss of natural resources. 42 U.S.C. § 9607(a)(4)(A), (C). Outside of the remediation process, States may pursue recovery of damages on behalf of the public as trustee of the state's natural resources to "*restore*, replace, or acquire the equivalent of such natural resources by the State." 42 U.S.C. § 9607(f)(1) (emphasis added). "CERCLA sets a floor, not a ceiling." *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1246 (10th Cir. 2006). And CERCLA does not cover damages to "purely private property." *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 460 (D.C. Cir. 1989). It does not force local residents simply to live with the impacts if they can prove, through their nuisance and trespass actions, that state law entitles them to damages for the restoration of their own land. As the Court observes, consistent with our parallel conclusion in *Sunburst*, CERCLA's "focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law." Opinion, ¶ 19 (quoting *Sunburst*, ¶ 59). The dynamic between individual restoration and CERCLA's coordinated large-scale response does not give rise to preemption as a matter of law. "Tension between federal and state law is not enough to establish conflict preemption. We find preemption only in those situations where conflicts

will necessarily arise. A hypothetical conflict is not a sufficient basis for preemption." *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007) (internal citations and quotations omitted).

¶34 In our limited Order accepting supervisory control in this case, we did not agree to review the District Court's orders in limine. But the Court observes that ARCO is not precluded at trial from contesting the merits of the Property Owners' restoration plans. Opinion, ¶¶ 19, 28. A claim for restoration damages requires the Property Owners to prove two separate elements: (1) temporary injury and (2) reasons personal for the restoration. *Lampi*, ¶ 29 (quoting *Sunburst*, ¶¶ 31-39). An injury is temporary "if the tortfeasor could restore the destroyed property to substantially the condition in which it existed before the injury. An injury that would cease to exist once remediation or restoration has been completed qualifies as temporary." *Lampi*, ¶ 32 (internal citations omitted). For temporary injury, the ability to repair the injury "must be more than a theoretical possibility." *Sunburst*, ¶ 31 (citing *Burk Ranches v. State*, 242 Mont. 300, 306, 790 P.2d 443, 447 (1990)).

¶35 The "reasons personal" element requires the Property Owners "to establish that the award actually will be used for restoration." *Lampi*, ¶ 31. The "personal reasons" analysis is required only when the restoration costs "exceed disproportionately" the diminution in value of the property. *McEwen v. MCR, LLC*, 2012 MT 319, ¶ 30, 368 Mont. 38, 291 P.3d 1253; *Sunburst*, ¶ 38. Finally, an "injured party is to be made as nearly whole as possible—but not to realize a profit. Compensatory damages are designed to compensate the injured

party for actual loss or injury—no more, no less." *Sunburst,* ¶ *40 (quoting Burk Ranches*, 242 Mont. at 307, 790 P.2d at 447).

¶36 "[T]hese issues normally present factual questions for the jury to resolve." *Lampi*, ¶ 48. The Court acknowledges the District Court's concern about allowing ARCO to "'cloak itself' in the authority of the federal government." Opinion, ¶ 19. I write separately to add that if ARCO contends that the Property Owners' proposed remedy conflicts with or requires modification of measures ARCO already has taken to clean up the site, ARCO must be able to address those conflicts in seeking to rebut the Property Owners' claim on the essential elements of proof under our standards for a restoration damages claim. What ARCO may not do at trial is point to the EPA's selected remedy and say, "We've done everything the government required; that's all we need to do." What ARCO may do is offer evidence to support its claim that the Property Owners' proposed restoration plan is not feasible and thus does not qualify as a temporary injury. And the Property Owners should have the opportunity to prove their claim that ARCO's cleanup efforts to date have not returned their properties to substantially the same condition in which they were before the injury, but that the injury will cease to exist if their proposed restoration plan is implemented. The Property Owners' proposals should be considered by the jury in the context of determining whether ARCO is liable for their alleged injuries and whether those injuries are compensable by an award of restoration damages. Evidence on the issue of temporary injury may well overlap with the evidence required to show, pursuant to our holding in *Atlantic Richfield Co.*, ¶ 77, whether the continuing tort doctrine tolled the period of limitations for the Property Owners' claims. It makes sense to allow

the parties to develop the evidence for the jury's consideration of these issues and a record that may be reviewed, if necessary, on appeal from any final judgment.

/S/ BETH BAKER

Justice Laurie McKinnon, dissenting.

¶37 Property Owners seek monetary damages for state law claims of nuisance, trespass, and strict liability. ARCO does not contest that litigation of these state law claims may proceed during the pendency of the CERCLA cleanup process and, accordingly, that issue is not before the Court. ARCO does contend that Property Owners' claim for restoration damages proposes a different cleanup plan than that chosen by the EPA, thus constituting a challenge which is preempted by CERCLA. In my view, Property Owners' restoration plan, which includes digging an 8,000-foot trench for a groundwater wall and removing 650,000 tons of soil over a period of years, would conflict with the ongoing EPA investigation and CERCLA cleanup.[1] The Court's conclusion that, during the pendency of a CERCLA cleanup effort, a jury may determine restoration damages and place the amount of money so determined in a trust for future restoration efforts, Opinion, ¶ 17, is not only

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1 To recover restoration damages under Montana law, the plaintiff must present evidence and convince the fact-finder that he will actually conduct the restoration upon which the restoration claim is based. *Lampi*, ¶ 31 ("The reasons personal rule requires plaintiff to establish that the award actually will be used for restoration . . . ."); *Sunburst*, ¶ 43; *McEwen*, ¶ 50. It is the actual performance of Property Owners' restoration plan—a prerequisite to their damage award—that impermissibly challenges the EPA's remedy. For purposes of brevity, I do not address other provisions of CERCLA which ARCO asserts would bar Property Owners from completing their restoration plan.

inconsistent with CERCLA and federal precedent, but has no authority in Montana law.[2] Property Owners may not "achieve indirectly through the threat of monetary damages . . . what [they] cannot obtain directly through mandatory injunctive relief incompatible with the ongoing CERCLA-mandated remediation." *New Mexico*, 467 F.3d at 1250. Moreover, "[d]amages must be proven by substantial evidence which is not the product of mere guess or speculation." *Sebena v. Am. Auto. Ass'n*, 280 Mont. 305, 309, 930 P.2d 51, 53 (1996). "[W]here no costs have been incurred, and no costs are reasonably certain to be incurred in the future, the plaintiff has not stated a claim for damages," and summary judgment should be granted. *Town of Superior v. Asarco, Inc.*, 874 F. Supp. 2d 937, 949 (D. Mont. 2004). *See also B.M. v. State*, 215 Mont. 175, 179, 698 P.2d 399, 401 (1985) ("Where plaintiff presents evidence of damages which are purely speculative, summary judgment is appropriate."). Here, there is no genuine issue of material fact that Property Owners' claim for restoration damages is a challenge to the EPA's remedial action and prohibited by CERCLA as a matter of law.

¶38 CERCLA is a "comprehensive statute that grants the President 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, 114 S. Ct. 1960, 1964 (1994).[3]

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[2] The Court errs when it applies the *Sunburst* analysis to the instant proceedings. In *Sunburst*, there was no question that Montana state courts had subject-matter jurisdiction over CERCLA and common law claims. Here, however, CERCLA-related activities are the exclusive, original jurisdiction of the federal courts and a challenge in state court to the chosen EPA remedy implicates the Supremacy Clause of the United States Constitution.

[3] CERCLA vests authority in the President, who, in turn, has delegated most of his functions and authority to the EPA. *See* 42 U.S.C. §§ 9606(c), 9615; 40 C.F.R. § 300.100.

"CERCLA is best known as setting forth a comprehensive mechanism to cleanup hazardous waste sites under a *restoration-based* approach." *New Mexico*, 467 F.3d at 1244 (citation omitted; emphasis added). CERCLA was intended to "promote the timely cleanup of hazardous waste sites, ensure that polluters were held responsible for the cleanup efforts, and encourage settlement through specified contribution protection." *Chubb*, 710 F.3d at 956. "One of the core purposes of CERCLA is to foster settlement through its system of incentives and without unnecessarily further complicating already complicated litigation." *Cal. Dep't of Toxic Substances Control v. City of Chico*, 297 F. Supp. 2d 1227, 1235 (E.D. Cal. 2004). *See also In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992) ("Congress sought through CERCLA . . . to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation."); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1264 (9th Cir. 2010) (noting that CERCLA was designed to ensure, *inter alia*, "that settlements are encouraged through specified contribution protection"); 42 U.S.C. § 9622. Under CERCLA § 113(f)(2), "[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." 42 U.S.C. § 9613(f)(2).

¶39 There are two types of cleanup actions under CERCLA: remedial actions and removal actions. Remedial actions generally are "long-term or permanent containment or disposal programs" while removal actions are "typically short-term cleanup arrangements." *Schaefer v. Town of Victor*, 457 F.3d 188, 195 (2d Cir. 2006) (citation and quotation omitted). CERCLA defines "remedial action" as:

> [T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, *to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment*. The term includes, *but is not limited to*, such actions at the location of the release as storage, *confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials*, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, *collection of leachate and runoff*, onsite treatment or incineration, provision of alternative water supplies, *and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment*. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24) (emphasis added).

¶40 CERCLA defines "remove" or "removal" as:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary . . . to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for . . . .

42 U.S.C. § 9601(23).

¶41 CERCLA-related activities may qualify as removal or remedial actions in at least three ways. *Hanford Downwinders Coal. v. Dowdle*, 71 F.3d 1469, 1474 (9th Cir. 1995).

First, the action may be specifically designated as removal or remedial activity. *Hanford Downwinders*, 71 F.3d at 1474. Second, cleanup activity explicitly classified in CERCLA as a "response" is, by definition, a removal or remedial action. *See* 42 U.S.C. § 9601(25) (defining "response" as a "removal" or "remedial action"). Finally, "even if action taken at a CERCLA site is not referred to in the statute as a removal or remedial action or a response action, the Timing of Review provision will still apply if the action satisfies CERCLA's definition of 'removal' or 'remedial.'" *Hanford Downwinders*, 71 F.3d at 1474.

¶42 CERCLA provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA]." 42 U.S.C. § 9613(b). Section 113(h) of CERCLA, titled "Timing of review," provides an exception to federal jurisdiction during the pendency of a CERCLA removal or remedial action: "No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action . . . ." 42 U.S.C. § 9613(h). Section 113(h) clearly and unequivocally precludes contemporaneous challenges to CERCLA cleanups, regardless of whether the challenge is made pursuant to federal or state law. Section 113(h) amounts to a "blunt withdrawal of federal jurisdiction" and precludes any challenge to CERCLA cleanups. *N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991); *accord Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1075 (11th Cir. 2002). "Section 113 withholds federal jurisdiction to review any . . . claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute 'challenges' to ongoing CERCLA cleanup actions." *MESS*, 47 F.3d at 329. Read in conjunction, § 113(b) and (h)

divest state courts of jurisdiction to review any state law claim which amounts to a challenge of a CERCLA removal or remedial action. *Fort Ord Toxics Project v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999). In *Fort Ord Toxics Project*, the Ninth Circuit observed that "by granting district courts exclusive jurisdiction over all controversies arising under CERCLA, Congress used language more expansive than would be necessary if it intended to limit exclusive jurisdiction solely to those claims created by CERCLA." *Fort Ord*, 189 F.3d at 832 (internal quotations and citations omitted).

¶43 The Ninth Circuit explained, "Congress concluded that the need for [swift execution of CERCLA cleanup plans] was paramount, and that peripheral disputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in progress." *MESS*, 47 F.3d at 329 (internal quotations and citations omitted). Accordingly, § 113(h) "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort. This result furthers the policy underlying CERCLA by allowing a quick response to serious hazards." *MESS*, 47 F.3d at 329 (emphasis in original). The court explained in *MESS*:

> We recognize that the application of Section 113(h) may in some cases delay judicial review for years, if not permanently, and may result in irreparable harm to other important interests. Whatever its likelihood, such a possibility is for legislators, and not judges, to address. We must presume that Congress has already balanced all concerns and concluded that the interest in removing the hazard of toxic waste from Superfund sites clearly outweighs the risk of irreparable harm.

MESS, 47 F.3d at 329 (internal quotations, citations, and footnote omitted). In *MESS*, the court was careful to explain that it was not deciding "whether or to what extent the district court can entertain MESS's various claims after implementation of the CERCLA cleanup

at McClellan is complete." *MESS*, 47 F.3d at 329, n.6. Accordingly, § 113(h) bars *any* claim that challenges an ongoing CERCLA cleanup effort. Further, the language of § 113(h) does not distinguish between federal and state claims or constitutional and statutory claims; instead, it delays judicial review of *any* challenges to unfinished remedial EPA efforts. *See Broward Gardens*, 311 F.3d at 1075.

¶44 The Ninth Circuit has provided clear guidance concerning what constitutes a "challenge" to a CERCLA cleanup effort. In *Razore v. Tulalip Tribes*, the court explained that "[a]n action constitutes a challenge if it is *related to the goals of the cleanup*." 66 F.3d 236, 239 (9th Cir. 1995) (emphasis added). Challenges to CERCLA cleanups were found where the plaintiff seeks to dictate specific remedial actions, *Hanford Downwinders*, 71 F.3d at 1482; to postpone cleanup, *Fort Ord*, 189 F.3d at 831; to impose additional reporting requirements on the cleanup, *MESS*, 47 F.3d at 330; and to terminate the Remedial Investigation/Feasibility Study (RI/FS) and alter the method and order of cleanup, *Razore*, 66 F.3d at 239. Consistent with the Ninth Circuit, the Tenth Circuit has held that a state claim is preempted by CERCLA if the "claim, or any portion thereof, stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA." *New Mexico*, 467 F.3d at 1244. The Eleventh Circuit similarly explained that "[t]o determine whether a suit interferes with, and thus challenges, a cleanup, courts look to see if the relief requested will impact the remedial action selected." *Broward Gardens*, 311 F.3d at 1072. The Eighth Circuit held that a suit challenges a remedial action within the meaning of § 113(h) if it interferes with the implementation of a CERCLA remedy. *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998).

¶45 The Ninth Circuit has also distinguished when a claim does not constitute a challenge to a CERCLA cleanup effort. In *Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995), the court held that a state law claim by water users seeking financial compensation for lost crops and profits resulting from the EPA's diversion of water was not a challenge to the CERCLA cleanup plan; however, the water users' claim for injunctive relief to prevent ARCO from diverting the water was a challenge to the EPA cleanup. In *ARCO Environmental Remediation*, 213 F.3d at 1113, a state law claim for access to public records and meetings did not relate to the goals of the EPA's cleanup and therefore did not constitute a challenge divesting the court of jurisdiction to entertain the claim. The lawsuit did not alter cleanup requirements or environmental standards and did not seek to delay or terminate the cleanup. Instead, the lawsuit involved the public's right to information about the cleanup. *ARCO Envtl. Remediation*, 213 F.3d at 1115.

¶46 CERCLA does not completely occupy the field of environmental regulation. Congress expressly declared that it had no intent for CERCLA to do so by enacting two savings clauses within CERCLA upon which Property Owners rely. The first savings clause, 42 U.S.C. § 9614(a), provides: "Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." The second, 42 U.S.C. § 9652(d) provides: "Nothing in this Act 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." Furthermore, Congress recognized the role of state law in hazardous waste cleanup when

it addressed the overlap of CERCLA and state law in 42 U.S.C. § 9614(b), which provides, in relevant part, that "[a]ny person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act." Congress clearly expressed "its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993); *accord Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-26 (3d Cir. 1991). The Ninth Circuit also explained that "Congress did not want § 113(h) to serve as a shield against litigation that is unrelated to disputes over environmental standards." *Fort Ord*, 189 F.3d at 831.[4]

¶47 While a principle purpose of CERCLA's savings clauses is to reinforce the right to demand hazardous waste cleanup apart from CERCLA, a savings clause "is not intended to allow specific provisions of the statute that contains it to be nullified." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). *See also Wyoming v. United States*, 279 F.3d 1214, 1234 (10th Cir. 2002) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864, 120 S. Ct. 1913, 1916 (2000), for the proposition that "[t]he Supreme Court has 'repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law'"). "CERCLA's savings clause must not be used to gut provisions of CERCLA." *PMC*, 151 F.3d at 618. Moreover,

[4] For examples of state courts dismissing state law claims under § 113(h) of CERCLA, *see O'Neal v. Department of the Army*, 742 A.2d 1095, 1100 (Pa. Super. Ct. 1999), and *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032-33 (Colo. Ct. App. 1996).

CERCLA does not establish a "new font of law on which private parties could base claims for personal and property injuries." *Artesian Water Co. v. Gov't of New Castle Cnty.*, 659 F. Supp. 1269, 1286 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988) (internal quotations and citations omitted). The purpose of a savings clause "is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute." *PMC*, 151 F.3d at 618. Thus, CERCLA's savings clause was enacted because Congress did not want to "wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it was enacted. The passage of federal environmental laws was not intended to wipe out the common law of nuisance." *PMC*, 151 F.3d at 618.

¶48 Any state law claim raised pursuant to CERCLA's savings clause which challenges the remediation efforts of the EPA must wait until after the response actions are completed because CERCLA "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." *New Mexico*, 467 F.3d at 1249 (quoting *MESS*, 47 F.3d at 329) (emphasis in original). When the EPA selects a remedy, no challenge to the cleanup may occur prior to completion of the remedy. This is true even if the claim is made pursuant to state law and attempts to invoke the state court's jurisdiction through CERCLA's savings clause. Federal courts have exclusive and original jurisdiction over any CERCLA-related activity. As explained in *Fort Ord*, 189 F.3d at 831, Congress made federal subject-matter jurisdiction broad, enacting a bar to jurisdiction through the provisions of § 113(h) during the pendency of a CERCLA cleanup effort. *See also Cannon v. Gates*, 538 F.3d 1328, 1336 (10th Cir. 2008). Accordingly, if the state

claims call "into question the EPA's remedial response plan, it is related to the goals of the cleanup, and thus constitutes a 'challenge' to the cleanup under [§ 113(h)]." *New Mexico*, 467 F.3d at 1249.

¶49 Neither a federal court considering CERCLA-related activity nor a state court considering a state claim pursuant to CERCLA's savings clause has subject-matter jurisdiction to consider the claim when the claim constitutes a challenge to CERCLA's cleanup effort. It makes little difference that the claim originated in state court when the relief sought constitutes a challenge. In *New Mexico*, 467 F.3d at 1252, the Tenth Circuit dismissed state claims of public nuisance and negligence for lack of subject-matter jurisdiction under § 113(h). In *Cannon*, 538 F.3d at 1334-36, the Tenth Circuit affirmed the trial court's dismissal of landowners' claims under the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-81, concluding that § 113(h) stripped subject-matter jurisdiction from the trial court to consider the claims. In *Broward Gardens*, 311 F.3d at 1076, the Eleventh Circuit affirmed the trial court's dismissal of landowners' claims because the court lacked subject-matter jurisdiction over the case because of § 113(h). In *Hanford Downwinders*, 71 F.3d at 1484, the Ninth Circuit affirmed the district court's dismissal of claims for lack of subject-matter jurisdiction and for failure to state a claim because of § 113(h). Given the substantial weight of authority which establishes the matter as being one of subject-matter jurisdiction, I am at a loss to understand how this Court can suggest, without any authority, that we "simply" allow "a jury of twelve Montanans" to "assess the merits of [the Property Owners' restoration] plan" and then instruct any resulting damages "be placed in a trust for the express purpose of effectuating the Property Owners' restoration

plan." Opinion, ¶ 17. Most respectfully, the Property Owners should not be permitted to proceed to a jury trial when the District Court clearly lacks subject-matter jurisdiction over the controversy. Indeed, any order denying ARCO's motion would be reviewable as an interlocutory order pursuant to M. R. App. P. 6(3)(c).

¶50 Property Owners seek monetary damages for: (1) "Injury to and loss of use and enjoyment of real and personal property"; (2) "Loss of the value of real property . . . "; (3) "Incidental and consequential damages, including relocation expenses and loss of rental income and/or value"; (4) "Annoyance, inconvenience, and discomfort over the loss and prospective loss of property value . . . "; and (5) "Expenses for and cost of investigation and restoration of real property" pursuant to Property Owners' restoration plan. ARCO does not dispute that Property Owners may proceed on the first four types of damages, which are being made pursuant to nuisance, trespass and strict liability.[5] ARCO does dispute that Property Owners may proceed on the fifth type of damage, contending that the District Court lacks subject-matter jurisdiction because of the ongoing CERCLA cleanup effort and the provisions of § 113(h). Accordingly, pursuant to the aforementioned authority, the District Court's grant of summary judgment to Property Owners on their claim for restoration damages must be reversed if Property Owners' restoration plan constitutes a challenge to the CERCLA cleanup effort at the Smelter Site. If Property Owners' proposed restoration plan "relate[s] to the goals of the cleanup," *Razore*, 66 F.3d

[5] Given the requirement that damages not be speculative, remote or conjectural, *Sebena*, 280 Mont. at 309, 930 P.2d at 53, it is difficult to comprehend how damages can be calculated prior to completion of CERCLA remedial efforts for those areas of compensation ARCO does not contest. *See New Mexico*, 467 F.3d at 1250. That issue, however, is not before the Court.

at 239, it constitutes a challenge to the CERCLA cleanup effort and the District Court is divested of jurisdiction.

¶51 Property Owners assert claims based on contamination to properties located within the legally defined boundaries of a federal Superfund site. The EPA issued its first administrative order to ARCO in 1984, which required ARCO to perform a site-wide RI/FS. Following completion of the study in 1987, the EPA divided the Smelter Site into five major sections called Operable Units, each relating to different cleanup remedies. Property Owners seek to restore land contained within several of these sections. The EPA continues its cleanup efforts in the designated area consistent with its selected remedies. The EPA estimates that active remediation of the Smelter Site will not be completed until 2025. ARCO filed affidavits and reports from its expert, Richard E. Bartlett, supporting its position that cleanup is ongoing and that as recently as 2016 residential soils and pasture were being cleaned to remove arsenic. ARCO also filed an Administrative Order on Consent, entered pursuant to CERCLA, that set forth how the cleanup effort was to proceed. As a result of monitoring and reexamination, the EPA has made amendments to its cleanup plan, primarily to incorporate the federal drinking water standard for arsenic from 18 ppb to 10 ppb. The EPA also added the action level for lead in 2013. The EPA asserts that it continues to monitor, modify, and reexamine remedies since the remedial plan was first implemented, which may result in additional amendments. Once the EPA remedy is completed on the Property Owners' land, the soil will be capped or backfilled with clean soil, vegetation, or other protective barrier. ARCO and the EPA maintain that tearing up the protective cap or layer of soil could increase dust transfer, bioavailability of

lead, and soil ingestion—all of which were concerns addressed by the EPA when it initially designed the cleanup plan. ARCO has filed affidavits and expert reports in support of its position. ARCO, the State, and local governments are currently negotiating a final site-wide consent decree that will encompass all remaining remedies and cleanup work to be conducted at the Smelter Site.

¶52 Property Owners propose a different cleanup or restoration plan. Property Owners do not dispute that their properties are located within the boundaries of the Superfund site. Nor do Property Owners dispute that they seek "full restoration" of their property, which is different from that selected by the EPA. Although Property Owners and this Court conclude, without any analysis, that Property Owners are not seeking to "stop, delay, or change the work EPA is doing," Opinion, ¶ 15, the Property Owners' plan is plainly contrary to the EPA's remediation plan. *See, e.g., New Mexico*, 467 F.3d at 1249-50; *MESS*, 47 F.3d at 329. Property Owners' experts, Richard Plaus and John Kane, advocate a lower level of arsenic in the soil than that proposed by the EPA. Property Owners propose excavating the soil to a deeper level and suggest the excavated soil be transported to Spokane, rather than local depositories. Property Owners also propose that a series of underground trenches and barriers be constructed to capture and treat shallow groundwater. The reactive barriers proposed by Property Owners would be 8,000 feet long, 15 feet deep, 3 feet wide, and situated upgradient of the town. The barriers would contain enzymes designed to remove arsenic in the water, which the EPA maintains could unintentionally contaminate both ground and surface water.

¶53 A district court must determine whether the complaint states facts that, if true, would vest the court with subject-matter jurisdiction. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552. Summary judgment should be granted "'if the pleadings, depositions, answers to interrogatories, and admissions on file,' together with any affidavits demonstrate that no genuine issue exists as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law." *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 10, 344 Mont. 435, 188 P.3d 1063 (quoting M. R. Civ. P. 56(c)). A defending party may be entitled to summary judgment on a certain type or category of damages. *See Corporate Air v. Edwards Jet Ctr. Mont., Inc.*, 2008 MT 283, ¶ 54, 345 Mont. 336, 190 P.3d 1111. Here, at the risk of stating the obvious, Property Owners request in their Third Amended Complaint "full restoration" of their properties while a restoration-based remedial plan selected by the EPA is being implemented. In addition, the affidavits and reports of each party's expert witnesses establish as a matter of law that Property Owners' claim for restoration damages challenges the EPA's selected remedial action and that the cleanup is still ongoing. Indeed, the undisputed evidence shows the EPA rejected the soil and groundwater remedies proposed by Property Owners during the course of the EPA's regulatory deliberations at the Smelter Site. In my opinion, the District Court erred, as a matter of law, in concluding that Property Owners' claim for restoration damages did not constitute a challenge to the remedial action plan chosen by the EPA.

¶54 I dissent from the Court's conclusion that Property Owners' claim for restoration damages is not barred pursuant to the provisions of § 113(h). The issue before this Court

is one of subject-matter jurisdiction which, if lacking, bars Property Owners from proceeding to trial on their claim for restoration damages. I would reverse because there is no genuine dispute of fact that Property Owners' restoration claim conflicts with the ongoing EPA investigation and CERCLA cleanup.6 The District Court, as a matter of federal law, lacks subject-matter jurisdiction to consider Property Owners' claim for restoration damages.

/S/ LAURIE McKINNON

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6 The question of whether Property Owners' claim for restoration damages constitutes a challenge to CERCLA cleanup efforts is pivotal to resolution of many issues in this case. For example, in *New Mexico*, 467 F.3d at 1250, the Tenth Circuit, having found that CERCLA's cleanup efforts were ongoing, determined that damages for common law public nuisance and negligence must be addressed at the conclusion of the EPA-ordered remediation. "Only then will we know the effectiveness of the cleanup and the precise extent of residual damage." *New Mexico*, 467 F.3d at 1250. Accordingly, I would not address ARCO's contention, at this juncture, that Property Owners are PRPs under 42 U.S.C. § 9622(e)(6) (CERCLA § 122(e)(6)) and therefore precluded from proceeding with their chosen remedy.

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 16-0555

ATLANTIC RICHFIELD COMPANY
Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE HONORABLE KATHERINE M. BIDEGARAY
Respondent,

UNITED STATES' AMICUS BRIEF

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Anacostia Riverkeeper v. Wash. Gas Light Co.,
892 F. Supp. 2d 161 (D.D.C. 2012) 19

Beck v. Atl. Richfield Co.,
62 F.3d 1240 (9th Cir. 1995) 10

Broward Gardens Tenants Ass'n v. U.S. EPA,
311 F.3d 1066 (11th Cir. 2002) 10

Cannon v. Gates,
538 F.3d 1328 (10th Cir. 2008) 10

Chubb Custom Ins. Co. v. Space Sys.,
710 F.3d 946 (9th Cir. 2013) 12

Diamond X Ranch, L.L.C. v. Atl. Richfield Co.,
51 F. Supp. 3d 1015 (D. Nev. 2014) 9

Fla. Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 19

Fort Ord Toxics Project, Inc. v. Cal. EPA,
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Hanford Downwinders Coal. v. Dowdle,
71 F.3d 1469 (9th Cir. 1995) 10

Hines v. Davidowitz,
312 U.S. 52 (1941) 19

McClellan Ecological Seepage Situation v. Perry,
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New Mexico v. GE,
467 F.3d 1223 (10th Cir. 2006) 8, 10

Oneok, Inc. v. Learjet, Inc.,
135 S. Ct. 1591 (2015) 20

PMC, Inc. v. Sherwin-Williams Co.,
151 F.3d 610 (7th Cir. 1998) 18

Pakootas v. Teck Cominco Metals, Ltd.,
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Razore v. Tulalip Tribes,
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Schalk v. Reilly,
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Tohono O'odham Nation v. City of Glendale,
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Town of Acton v. W.R. Grace Co.,
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United States v. City & Cty. of Denver,
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United States v. Gonzales,
520 U.S. 1 (1997) 11

United States v. James,
478 U.S. 597 (1986) 11

Villegas v. United States,
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Voluntary Purchasing Groups, Inc. v. Reilly,
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State Cases:

Lampi v. Speed,
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Sunburst Sch. Dist. No. 2 v. Texaco, Inc.,
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STATEMENT OF THE CASE

In an October 5, 2016, order this Court invited the United States Environmental Protection Agency (EPA) to file this *amicus* brief, addressing whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) bars or otherwise prevents a claim for restoration damages under Montana law that a group of 98 landowners has filed against the Atlantic Richfield Company (ARCO).

STATEMENT OF ISSUES

Does CERCLA bar the landowners' claim for restoration damages?

STATEMENT OF FACTS

The United States relies on ARCO's November 17, 2016 brief to set out the primary factual and procedural background. In addition, however, we note that though EPA has been actively responding to hazardous-substance contamination at the Site for more than 30 years, significant work remains. This includes cleanup of an additional 1,150 residential yards, revegetation of 7,000 acres of upland soils, and removal and closure of waste areas, stream banks, and railroad beds. Final Residential Soils Report, August 7, 2015, available at https://semspub.epa.gov/src/document/08/1549208; Fifth Five-Year Review (Sept. 25, 2015), Table 10-1 at 10-7 https://semspub.epa.gov/src/document/08/1549381.

EPA estimates that ARCO will complete this work by approximately 2025, though monitoring and maintenance work will continue indefinitely. Fifth Five-Year Review, Table 10-7 at 10-58.

Response actions at two of EPA's five Operable Units (OUs) directly impact the landowners' property: Community Soils (CSOU), which primarily addresses residential yards contaminated with arsenic and lead in Anaconda, Opportunity, and the surrounding area; and Anaconda Regional Water, Waste, and Soils (ARWWS OU), which addresses a variety of soil, surface water, and groundwater contamination issues throughout the Site. *See generally* Record of Decision, Community Soils Operable Unit, Sept. 1996, CSOU ROD; *see also* Record of Decision, ARWWS OU, Sept. 1998 (ARWWS OU ROD).[1] EPA considered construction of an underground Permeable Reactive Barrier (PRB), similar to the barrier proposed by the landowners, along Willow Creek for collecting and treating groundwater south of Opportunity to protect surface water in Willow Creek to the south and east of Opportunity. ARWWS OU ROD Am. § 6.4.2.1; ARWWS OU ROD Am. Responsiveness Summary § 3.0. EPA concluded, however, that this approach would not necessarily achieve the human health standard in Willow Creek and would not eliminate exceedances of arsenic in downstream receiving

[1] The ARWWS OU ROD is available at http://goo.gl/DWz1pF.

waters. *Id.* § 6.4.3.1 & Responsiveness Summary § 3.0. EPA also determined that it was technically impracticable to reduce arsenic concentrations below 10 ppb in shallow groundwater in the South Opportunity aquifer. *Id.* § 6.4.1. EPA therefore did not select below-ground structures to address groundwater arsenic concentrations.

STANDARD OF REVIEW

EPA adopts the Standard of Review set out in Petitioner's brief.

SUMMARY OF ARGUMENT

In CERCLA, Congress narrowly circumscribed when and how to challenge an EPA-selected remedy and provided EPA with authority to review and approve remedial actions undertaken by potentially responsible parties to ensure that contaminated sites are cleaned up efficiently and without delay. Specifically, CERCLA section 113(h) bars "any challenges" to a removal or remedial action selected under CERCLA section 104. *See* 42 U.S.C. §§ 9604, 9613. The landowners' restoration-damages claim challenges EPA's selected response actions at the Site because the landowners would require different cleanup standards and actions for soil cleanup, and require installation of underground groundwater barriers, which could undermine EPA's cleanup approaches. Section 113(h)

prohibits this claim because it would impose different response actions than those selected by EPA.

Additionally, the doctrine of conflict preemption independently bars ARCO's restoration-damages remedy. Congress delegated the President authority to set cleanup levels and select response actions. Implementing the landowners' restoration-damages remedy would undermine Congress's approach, and aspects of the landowners' proposed remedy conflict with EPA's response action. Because Congress intended to supersede these types of non-federal remedies, the doctrine of conflict preemption bars the landowners' proposed cleanup.

Even if these principles did not bar the landowners' claim, CERCLA section 122(e)(6), 42 U.S.C. § 9622(e)(6), requires EPA authorization of any remedial action at a CERCLA site by potentially responsible parties where, as here, EPA has already initiated a remedial investigation and feasibility study. The landowners own property at the Site, and the District Court did not properly assess whether the landowners are potentially responsible parties under CERCLA. It is likely that some, if not all, of the landowners are potentially responsible parties. No landowner has sought EPA approval to undertake any remedial action at the Site. EPA is unlikely to approve the landowners' approach, and no court should assume that the landowners' proposed remedy could be implemented. Thus, the

landowners' proposed remedy is not a reliable basis for an award of restoration damages.

ARGUMENT

Over the course of more than three decades, EPA has invested millions of dollars in agency resources and thousands of hours of employee time, and has required ARCO to spend hundreds of millions more characterizing the Site, developing RODs, and cleaning the Site. The remedy-selection process continues to respond to public concerns and new data. For example, EPA significantly amended the RODs in 2011 and 2013 based on new information. The remedy-selection and implementation processes account for a wide range of technical, scientific, and community concerns.

EPA's responsibility is to protect human health and the environment based on sound science. It is vital that cleanups proceed expeditiously once EPA selects a remedy. Congress was concerned that consideration of the same broad interests that make for a robust remedy-selection process should not work to prevent EPA's selected remedy from moving forward.

Congress included statutory provisions such as CERCLA's section 113(h), 42 U.S.C. § 9613(h), and section 122(e), 42 U.S.C. § 9622(e), to ensure that an EPA-selected cleanup moves forward without obstruction, delay, and the diversion of

resources accompanying judicial challenge and litigation-based additional cleanup requirements and expenses. No matter how well intentioned, any attempt to impose conflicting cleanup standards and response actions is prohibited by CERCLA.

I. Section 113(h) of CERCLA Prohibits the Landowners' Claim for Restoration Damages.

Under Montana law, restoration damages redress an injury to property, and may exceed the diminution in market value of property caused by the particular injury. *See Lampi v. Speed*, 261 P.3d 1000, 1004 ¶ 21 (Mont. 2011); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086-88 ¶¶ 28-31, 38 (Mont. 2007). To prevent a windfall, Montana requires a plaintiff asserting a claim for restoration damages to show that any award of such damages will actually be used to abate the injury. *Sunburst*, ¶ 40-43; *Lampi*, ¶ 31. The landowners' claim for restoration damages poses a prohibited challenge because it would (1) impose more stringent cleanup levels, (2) impose additional requirements, and (3) require approaches to groundwater remediation and soil disposal that directly conflict with EPA's ROD.

A. The Landowners' Restoration Damages Claim Is an Impermissible Challenge to EPA's Ongoing Cleanup of the Anaconda Smelter Site.

The section 113(h) bar applies to any claims that in their effect "challenge[] any removal or remedial action selected under section 9604 of this title" or seek

"to review any order under section 9606(a) of this title." 42 U.S.C. § 9613(h). The Ninth Circuit has found this language to be "clear and unequivocal," and "amount[ing] to a blunt withdrawal of ... jurisdiction" for "any challenges" to an ongoing CERCLA response action, including any attempt to interfere with, strengthen, or control the cleanup or remedy. *McClellan Ecological Seepage Situation*, 47 F.3d 325, 328 (9th Cir. 1995) (internal citations omitted). Congress chose to prioritize expeditious cleanup of hazardous substances and to ensure that litigation would not interfere with such cleanup actions.

The District Court here held that the restoration-damages claim could proceed to trial because a claim challenges EPA's cleanup "*only* if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup." August 30 Slip Op. at 9 (emphasis added) (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000)). This holding is erroneous, mischaracterizes Ninth Circuit law, and reflects an overly narrow view of section 113(h). In the case cited by the District Court, *ARCO Environmental Remediation*, the Ninth Circuit held only that a claim regarding the right to access public information about a cleanup was not a "challenge" because that claim was not, in any way, related to the goals of the challenged cleanup. *Id.* The Ninth Circuit did not hold that termination or delay was *necessary* to trigger section

113(h). Rather, it recognized, in dicta, that termination or delay of an EPA-mandated cleanup was *sufficient* to trigger the section 113(h) bar.[2] *See* 213 F.3d at 1115.

The District Court should have dismissed the restoration-damages claim. Most courts have correctly concluded that any suit that will "impact the implementation" of the government's selected CERCLA response action constitutes a "challenge" within the meaning of section 113(h). *See Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990). While Congress did not intend to bar all state-law claims related to hazardous substances, *see New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243-44 (10th Cir. 2006) (citing cases), many courts have correctly found that Congress did intend to bar attempts to apply *any* law that even indirectly works to control, alter, or interfere with an EPA-selected remedy, or that

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[2] Section 113(h) states that "[n]o Federal court shall have jurisdiction ... under State law ... to review any challenges to removal or remedial action ...." 42 U.S.C. § 9613(h) (emphasis added). The landowners did not argue in district court that section 113(h) is inapplicable to state courts, but state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim. CERCLA section 113(b) gives "the United States district courts" "exclusive original jurisdiction over all controversies arising under [CERCLA] ...." *Id.* § 9613(b). The Ninth Circuit has explained that section 113(h) speaks in terms of actions brought in federal courts because Congress required CERCLA controversies be litigated in federal courts. *See Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999); *see also O'Neal v. Dep't of the Army*, 742 A.2d 1095, 1100-01 (Pa. Super. Ct. 1999).

otherwise affects the goal of the remedy. *See McClellan*, 47 F.3d at 330. Even claims that purport to strengthen EPA's selected remedy are barred. *Id.*; *see also United States v. City & County of Denver*, 100 F.3d 1509, 1513-14 (10th Cir. 1996) (zoning requirements barred); *Town of Acton v. W.R. Grace Co.*, No. 13–12376–DPW, 2014 WL 7721850 (D. Mass. Sep. 22, 2014) (municipal groundwater cleanup standards barred).

A "challenge" includes actions that are "related to the goals of the cleanup." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Courts have even barred claims seeking to enforce other federal laws and state laws that attempt to supplement EPA's CERCLA remedy. *See, e.g.*, *Diamond X Ranch, LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1021 (D. Nev. 2014). The Ninth Circuit has made clear that the prohibition of section 113(h) applies equally to both federal and state actions because "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; *see also ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *McClellan*, 47 F.3d at 328; 42 U.S.C. § 9613(b).

In *McClellan,* the Ninth Circuit ruled that a suit seeking to impose additional reporting requirements would "second-guess" EPA's determination and interfere with the remedial action selected, and was accordingly barred by section 113(h).

47 F.3d at 329-30. Similarly, in *Razore*, the court held that section 113(h) barred the plaintiffs' claims regarding EPA's cleanup of a former landfill, which amounted to an "attempt to dictate specific remedial actions and to alter the method and order for cleanup." 66 F.3d at 239-40; *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220-23 (9th Cir. 2013); *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995); *ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *Villegas v. United States*, 926 F. Supp. 2d 1185, 1196 (E.D. Wash. 2013) ("CERCLA's broad jurisdictional bar applies to any suit that challenges any aspect of a CERCLA removal or remediation action, regardless of whether the suit purports to be based on CERCLA."). Other circuits have reached similar holdings. The Tenth Circuit held that a state public-nuisance and negligence suit seeking an unrestricted award of money damages was barred by section 113(h). *New Mexico*, 467 F.3d at 1249-50; *see also Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002); *Cannon v. Gates*, 538 F.3d 1328, 1335-36 (10th Cir. 2008).

The District Court incorrectly distinguished the Tenth Circuit's decision by drawing a distinction between common-law and statutory claims. Aug. 30 Slip Op. at 10. But CERCLA section 113(h) does not focus on the nature of the underlying

cause of action. Rather, it requires courts to assess the impact of the non-federal remedy (here, the restoration-damages claim) to determine if that remedy poses a prohibited "challenge." *See* 42 U.S.C. § 9613(h). *New Mexico*, along with *McClellan*, *Razore*, and the other cases cited above, shows how courts have assessed what constitutes a prohibited challenge. While many common-law claims survive, the express statutory language of CERCLA makes clear that no claim survives if it seeks to challenge or has the effect of challenging EPA's ROD.

These readings of the scope of section 113(h) are dictated by the broad language used by Congress. Congress emphatically barred "*any* challenges to removal or remedial action … in *any* action," 42 U.S.C. § 9613(h) (emphasis added); and the United States Supreme Court recognizes the comprehensive scope of the term "any." *See United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *see also United States v. James,* 478 U.S. 597, 605 (1986) ("Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction" (emphasis in original)). The sweeping nature of Congress's word choice supports a broad reading of the language of section 113(h).

Legislative history also supports a broad reading of section 113(h). The Chairman of the Senate Judiciary Committee explained:

> The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the actions that are performed by EPA. The section covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986). Such an intent to prohibit review of "all lawsuits" under "any authority," and to cover "all issues," supports the conclusion that section 113(h) bars the landowners' challenge to EPA's ROD.

Finally, actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA. *See* 42 U.S.C. § 9622; *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013). The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations.

Importantly, Congress also provided mechanisms to challenge EPA's ROD. Those mechanisms are listed in section 113(h). For example, if the landowners believe that EPA's remedy is not sufficiently protective, they may bring a citizen suit under 42 U.S.C. § 9659. *See id.* § 9613(h)(4). By barring litigation that

challenges a cleanup plan, section 113(h) ensures that EPA, state agencies, and potentially responsible parties participating in a cleanup can develop and implement an adequate and fully realized cleanup plan.

B. As a Factual and Practical Matter, Implementing the Landowners' Remedy Will Undermine EPA's Ability to Implement Its Own Remedy.

In the prior section, we address law surrounding the nature of a "challenge" under section 113(h). Here, we focus on how the landowners' claim impacts EPA's remedy at the Site. Under Montana law, the landowners must use any restoration-damages award to restore the affected properties. It follows that obtaining restoration damages under state law necessarily means implementing a cleanup action different from the one selected by EPA. The landowners' experts take issue with the cleanup standards selected by EPA, seeking to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA. The landowners' experts also proposed actions that differ from those EPA has required, including: (1) excavating to two feet rather than EPA's chosen depth of 18 inches within residential areas; (2) transporting the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA; and (3) constructing a series of underground trenches and barriers for capturing and treating shallow groundwater. The landowners' experts' reports are not detailed, but do indicate that aspects of those plans are a dramatic departure from EPA's ROD

requirements. Given the ongoing cleanup at the Site, the landowners bear the burden of showing consistency with section 113(h)—any missing details weigh in favor of dismissing the landowners' claim.

The District Court, disregarding the 1150 properties that remain to be cleaned, appeared to rely heavily on ARCO's representation that the cleanup of the landowners' residential yards will be finished by November 1, 2016, to support its conclusion that the landowners' supplemental restoration requirements will not interfere with ongoing ROD requirements. Aug. 30 Slip Op. at 8. The District Court's conclusion ignores the full impact of permitting the restoration claim to go forward. Allowing individual property owners to divert cleanup resources from the implementation of EPA's ROD is a direct conflict with EPA's cleanup process. Goals of the CSOU ROD, for example, include minimization of dust transfer, bioavailablity of lead, and soil ingestion. CSOU ROD Am. at II-11. Once the EPA remedy at the landowners' properties is complete, the completed yards are either capped or backfilled with clean soil. *See, e.g.*, CSOU ROD Am. II-18 – II-19 (setting residential-soils requirements including a "soil swap" and ensuring "replacement with clean soil and a vegetative … or other protective barrier"). Tearing up that protective cap or layer of soil directly impacts EPA's chosen remedy and could expose the neighborhood to an increased risk of dust transfer or

contaminant ingestion. Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public. Even if the landowners attempt to coordinate their efforts with EPA, their involvement would slow the implementation and timeline of EPA's ROD and increase the agency's costs. The District Court's analysis wrongly assumed that the restoration on the Site proposed by the landowners' experts could proceed without risk or consequence. *See* Aug. 30 Slip Op. at 8. Additionally, even if EPA could coordinate with the landowners, recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres.

The landowners' proposal to install underground reactive barriers is plainly inconsistent with EPA's cleanup, and may pose even greater risks. First, it is important to understand that water from domestic wells in the town of Opportunity is generally clean and drinkable, due to natural conditions in the deep underground aquifer accessed by the wells, and to hydraulic controls (a drain-tile system) that intercept arsenic contamination in shallow groundwater beneath the town of Opportunity. ARWWS ROD Am. at 6.4.1. If conditions change, EPA can take additional actions that it deems appropriate to protect human health and the environment based on what it learns through monitoring. ARWWS ROD Am. at 6.4.5.

By contrast, the landowners would build several underground permeable reactive barriers. Kane Rep., Opinion 4(b), at 10. These barriers, intended to treat shallow groundwater moving toward Opportunity, would be 8,000 feet long, 15 feet deep, three feet wide, and situated upgradient of the town. *Id.* Shorter barriers would be placed upgradient of individual landowners' properties. *Id.* These barriers could change the groundwater flow in unpredictable ways, which could impact current hydraulic controls. The barriers proposed by the landowners' experts contain elements and enzymes that supposedly strip arsenic in water but could unintentionally contaminate groundwater and surface water. *Id.* In other words, the landowners' remedy could upset a balance that currently protects human health and the environment. Additionally, if EPA sampling detects elevated contamination following landowners' installation of underwater barriers, EPA will not be able to determine whether the contamination was impacted by the landowners' project, complicating potential remedial options. If other property owners later filed similar claims and demanded construction of additional structures not envisioned by the ROD the situation becomes even more complex. Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids *ad hoc* addition of potentially competing cleanup measures. The District Court took far too narrow a view of the

impact of the scope of a prohibited challenge—looking primarily to whether the landowners "seek to alter the ROD" or "change any of the requirements that the EPA has imposed upon ARCO." August 30 Slip Op. at 9.

CERCLA cleanups are often iterative in that EPA uses data obtained during the remedial investigation and early monitoring to inform subsequent adjustments to its cleanup plan. *E.g.*, CSOU ROD Am. Part II § 3.0 (describing how data obtained through sampling implemented under the original CSOU ROD led EPA to add lead remediation to its soil cleanup). Lawsuits that seek to impose different or additional remedial actions while a cleanup is in progress not only would result in diversion of limited government resources and delay of EPA's cleanup efforts contrary to Congress's intent, *McClellan*, 47 F.3d at 329, but also would force the parties to litigate the details of a cleanup plan that may not be final.

Not only would the landowners set a new remedial goal for soils (8 ppm for arsenic, compared to the 250 ppm ROD standard), they would achieve their goals through different methods. As in *McClellan*, the landowners' experts advocate remediation levels that are "directly related to the goals" and methods of the cleanup of the Site prescribed by EPA. Section 113(h), however, does not allow the landowners to use their state-court lawsuit to supplement EPA's selected response-action cleanup levels.

C. Section 113(h) Bars the Landowners' Restoration-Damages Claim Irrespective of CERCLA's Savings Clauses.

The District Court relied on CERCLA's savings clauses in holding that section 113(h) did not bar the landowners' restoration-damages claim. Aug. 30 Slip Op. at 5-8. No savings clause, however, shields the landowners' restoration-damages claim. Section 302(d) of CERCLA, which provides in part that "[n]othing 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," 42 U.S.C. § 9652(d), is not in conflict with section 113(h). As the Ninth Circuit stated in *Razore*, "[t]he temporary bar to citizen enforcement does not change [a potentially responsible party's] 'obligations or liabilities'" under other statutes. 66 F.3d at 240. Moreover, reading section 302(d) to govern the interpretation of section 113(h) "would effectively write [section 113(h)] out of the Act," a result that would be contrary to the court's "duty to give effect, if possible, to every clause and word of a statute." *Id.* (alteration in original) (citations omitted). As the Seventh Circuit has pointed out, while "federal environmental laws [were] not intended to wipe out the common law of nuisance," section 302(d) "must not be used to gut provisions of CERCLA." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998).

Two other provisions of CERCLA, sections 114(a) and 310(h), also contain savings provisions, but neither provision trumps the limitations Congress set out in section 113(h). 42 U.S.C. §§ 9614(k), 9659(h). Section 310(h) provides that the statute "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)] of this title.*" 42 U.S.C. § 9659(h) (emphasis added). The express language of this savings clause demonstrates the primacy of section 113(h). *See Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012). Section 114(a) likewise contains no language that would overcome the limitations Congress set out in section 113(h). This case presents a perfect example of how these provisions interrelate. CERCLA does not bar all of the landowners' state-law claims – only the landowners' claim for restoration damages.

II. Principles of Conflict Preemption Independently Bar the Landowners' Restoration-Damages Remedy.

If there is a conflict between federal and state cleanup standards, federal law prevails where it is "a physical impossibility" to comply with both the federal and state mandates, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*,

312 U.S. 52, 67 (1941). Where state action conflicts with a CERCLA cleanup, state cleanup standards are preempted. *See City & County of Denver*, 100 F.3d at 1512-14. Even if section 113(h) did not bar the landowners' restoration damages claim, the doctrine of conflict preemption, grounded in the Supremacy Clause, U.S. Const. art. VI, cl. 2, independently bars the landowners'' restoration-damages remedy here. *See generally Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015).

In conducting a preemption analysis, two bedrock principles guide the courts: (1) the purpose of Congress; and (2) "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Nation v. City of Glendale*, 804 F.3d 1292, 1298 (9th Cir. 2015) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Congress, in CERCLA, established how EPA should determine the degree of cleanup at a site, including how EPA should consider non-federal standards (such as state standards) in selecting the final cleanup level. *See* 42 U.S.C. § 9621(d). Congress was clear that the President or his delegates were responsible for remedy selection, after considering state-law cleanup standards and a host of other factors. *See id.* § 9621(a). Allowing the landowners' restoration-damages claim to proceed

cannot be reconciled with that congressionally mandated approach for consideration of state and local requirements.

Aspects of the landowners' restoration plan also conflict with EPA's RODs or could make those remedies difficult or impossible to achieve, as discussed more fully in argument section I-B. For example, the landowners' proposed construction of a series of underground barriers could divert groundwater in several areas of concern, which are subject to ongoing groundwater-monitoring efforts under EPA's selected cleanup plan. Additionally, the same excavated soil cannot be transported to EPA-approved onsite repositories, as provided for in the CSOU ROD, and also be transported to Missoula or Spokane, as required in the landowners' restoration plan.[3] This is the type of uncoordinated response that CERCLA section 121(d), 42 U.S.C. § 9621(d), was designed to prevent.

III. Even if Plaintiffs' Claims Were Otherwise Permissible, the Relief They Seek May Be Barred Under CERCLA Section 122(e)(6).

As Congress provided in section 122(e)(6) of CERCLA:

> When either the President, or a potentially responsible party ... 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 [EPA].

---

[3] Even if the landowners deposit excavated soil onsite, that approach would create additional costs for EPA's cleanup.

42 U.S.C. § 9622(e)(6). The President has initiated a remedial investigation and feasibility study (RI/FS) for the Anaconda Smelter Site under CERCLA, through EPA securing ARCO's agreement to perform the RI/FS for the various operable units within the Site. Consequently, no PRP may undertake any remedial action at the Site without EPA authorization. *See id.* § 9622(e)(6). EPA has not authorized the remedial action the landowners appear to seek in their restoration-damages claim, and therefore neither ARCO nor any landowner PRP may undertake it. Though the landowners seek money damages, those damages presuppose a subsequent remedy that is unauthorized. EPA is unlikely to approve the cleanup proposed by the landowners because that approach is inconsistent with EPA's RODs for the reasons discussed in sections I-A, I-B, and II of this brief. Such a tentative proposal is not a proper basis for a damages award.

CERCLA designates current owners of contaminated property as PRPs, *see* 42 U.S.C. § 9607(a)(1), unless they meet certain requirements, *see id.* § 9607(q). The District Court improperly concluded that the landowners need to be somehow "declared PRPs" to be considered a potentially responsible party. Aug. 30 Slip Op. at 15. That conclusion is incorrect, and is untethered to the statutory language. Parties that meet the requirements set out in 42 U.S.C. § 9607(a)(1) are, by definition, potentially responsible parties—regardless of whether they have

defenses that could absolve them of liability. Most relevant here are the so-called "third party" and "innocent landowner" defenses, by which a PRP may show that the release of hazardous substances was caused solely by "an act or omission of a third party," *id.* § 9607(b)(3), or that "the disposal or placement of the hazardous substance" occurred before the PRP acquired the property, *id.* § 9601(35)(A). However, those defenses are defenses to a PRP's liability for cleanup costs. Section 122(e)(6) prohibits PRPs from initiating a remedial action without EPA permission.

The District Court failed to undertake the proper statutory analysis by focusing on whether the landowners were "*potentially* responsible parties." The District Court likewise failed to assess whether any of the 98 landowners qualified as a protected "third party" or "innocent landowner" under the statutory definitions. Thus, the District Court's conclusion that all 98 landowners are not subject to the requirements of CERCLA section 122(e)(6) is fatally flawed.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over, and should dismiss, the landowners' claim for restoration damages.

DECEMBER 8, 2016

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CERTIFICATE OF SERVICE

I certify that, on this 8th day of December 2016, a copy of the foregoing document was served by first-class mail to counsel of record for each of the parties, as set forth below.

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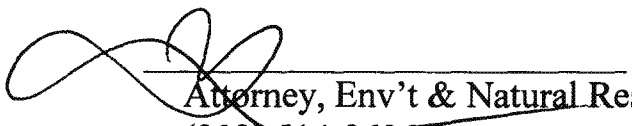

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CERTIFICATE OF COMPLIANCE

The foregoing brief uses a monospaced Times New Roman 14 point typeface. According to the Microsoft Word text counting function, this brief contains 4,999 words. This brief complies with the 5,000 word limit for amicus briefs set by Rule 11(4) of the Montana Rules of Appellate Procedure.

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Message

From: Miner, Robert [Robert.Miner@bp.com]
Sent: 4/18/2018 1:12:30 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]; Benevento, Douglas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93dba0f4f0fc41c091499009a2676f89-Benevento,]
CC: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]
Subject: Visit to Rico, Colorado site
Attachments: bp-advancing-the-energy-transition.pdf

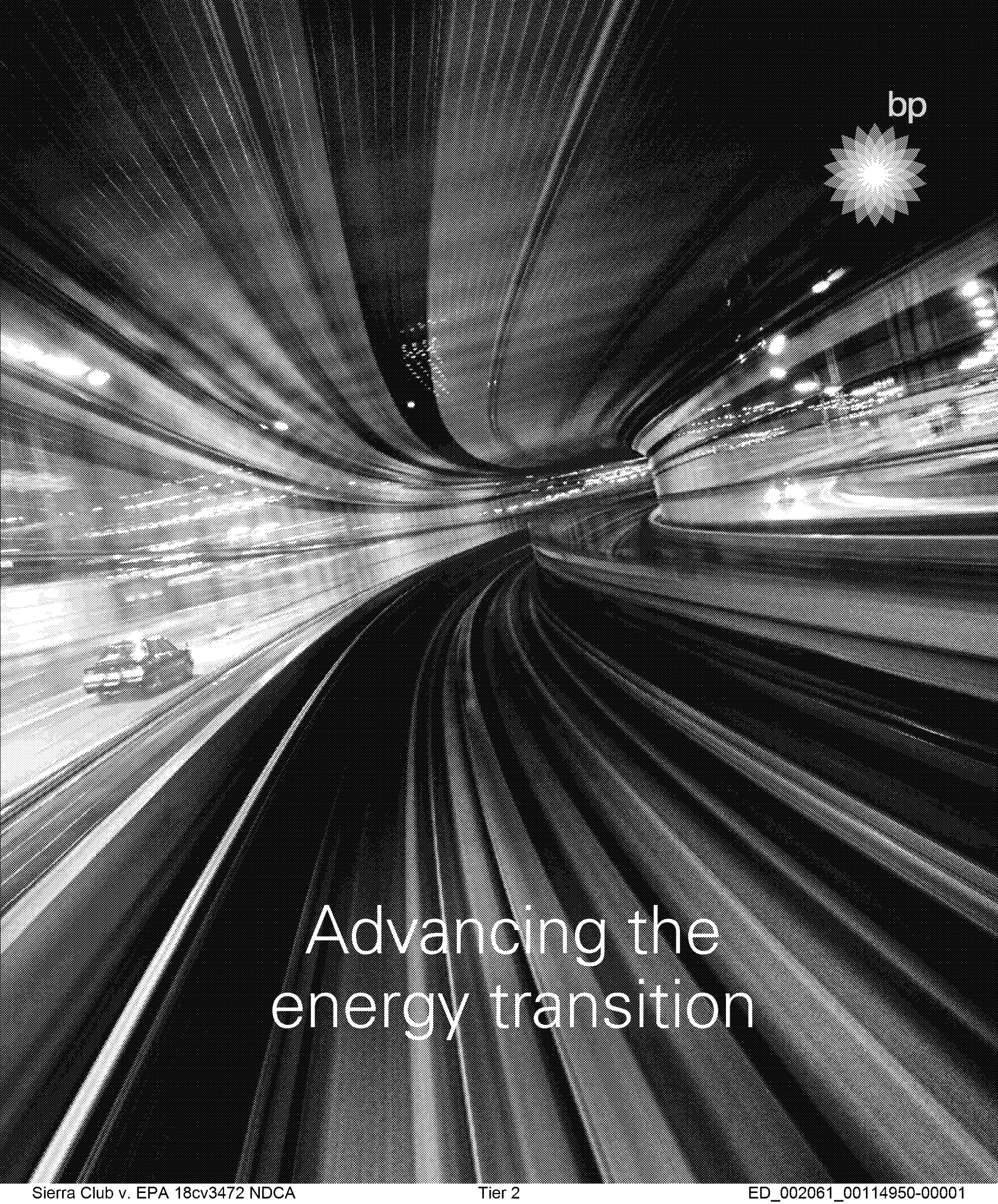
Kell and Doug:

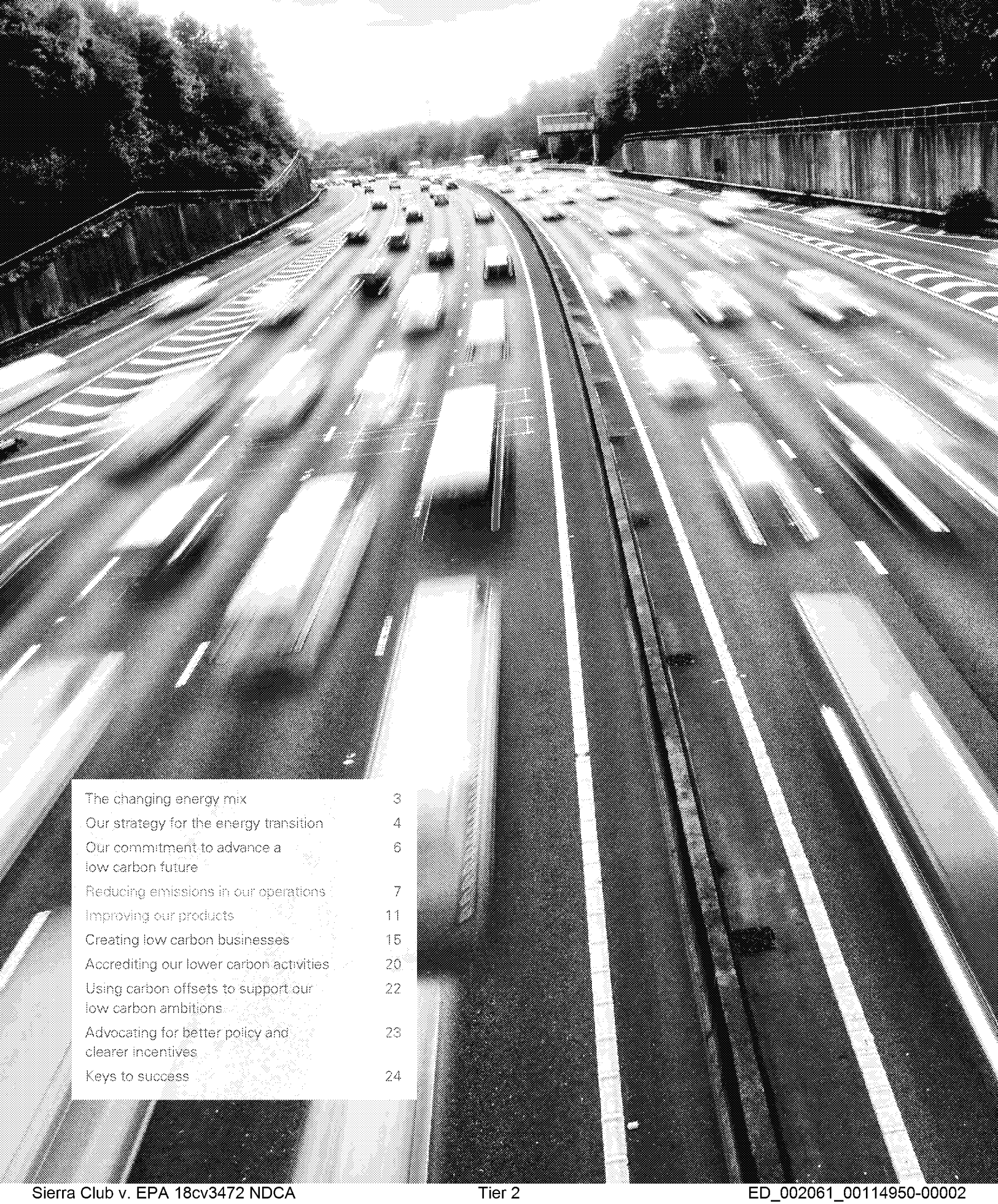
Patricia Gallery let me know about your interest in visiting the sustainable wetlands project at Rico, Colorado. Atlantic Richfield would be delighted to host you both there.

Could you offer us a few times in the next few months when you might be available to head to Rico for a tour with our Colorado team?

By the way, BP just released a very interesting report on our efforts to meet the world's growing energy demands while working to reduce our carbon footprint. I am including it in case you might be interested in taking a look.

Robert Miner
Head of State and Local Affairs
BP America
Personal Matters /


bp
Advancing the
energy transition



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Introduction from Bob Dudley

The world is growing like never before, creating opportunity for billions of people. And all this growth requires energy. But as the world demands more energy it also demands that it be produced and delivered in new ways, with fewer emissions.

At BP, we embrace this dual challenge. We have always looked to the future, adapted to change and met challenges like this head on.

In this report, we examine how the energy world is rapidly changing, set out our low carbon ambitions and show how we are helping to advance the energy transition.

Our experience

Two decades ago, BP was one of the first energy companies to address the threat of climate change, pioneering alternatives like wind, solar and biofuels. We invested billions of dollars to make renewable energy a genuine alternative.

Some of our investments worked out – others did not. We were early, but I don't think we were wrong, because we learned valuable lessons along the way.

To deliver significantly lower emissions, every type of energy needs to be cleaner and better. A race to renewables will not be enough. That's why we are making bold changes across our entire business.

Our low carbon ambitions

Here's how we are doing it: by reducing, improving, creating. We're reducing emissions in our own operations; we're improving our products to help customers lower their emissions; and we're creating low carbon businesses.

We are able to do this because of the innovative mindset of our people, our unique global research network, and the potential being unleashed by digital, big data and advanced technologies. This is allowing us to rapidly develop new ways to tackle emissions and improve efficiency, and to deploy these throughout BP.

→ **Reduce**
We have set clear targets for emissions in our operations. So even as our business grows to meet growing demand, our net carbon emissions will not. We'll deliver this through sustainable reductions in our greenhouse gas emissions, by keeping a cap on our methane intensity and, as necessary, with offsets to keep net emissions at 2015 levels. We appreciate that there's more to do – but we see this as a critical next step in our journey to reduce emissions.

→ **Improve**
We're producing more natural gas – a lower carbon alternative to coal and a complement to renewables. And we're working with auto manufacturers to create fuels and lubricants that allow drivers to go further with fewer emissions. >>

→ **Create**
We are also creating low carbon businesses, such as LightSource BP, adding solar to our long-established renewables businesses in wind and biofuels.

And some of our most exciting work is in venturing, where we are making investments in a range of smart technologies and experimenting with new business models. The energy landscape is evolving quickly and no single solution is emerging as yet. But we will be ready to scale up the most promising innovations into viable new businesses as the future becomes clearer

To validate all these efforts and encourage further action, we are introducing an accreditation programme across BP that we're calling Advancing Low Carbon.

A shared challenge

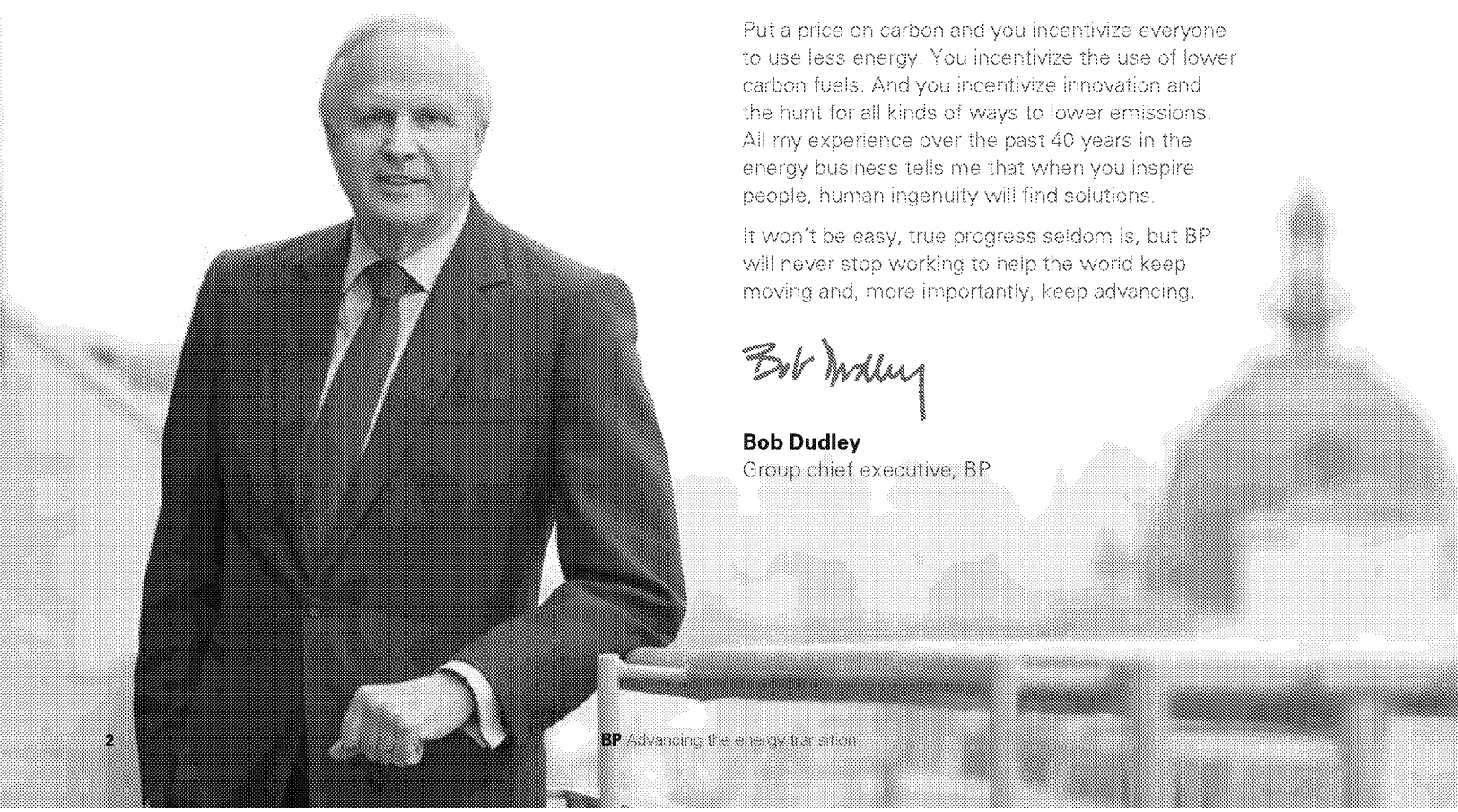
I am surrounded by people who want to play their part: engineers, scientists, technicians, economists, specialists in energy policy. We are all hungry to do more. But we know that on our own, it is never going to be enough.

The transition to a lower carbon economy requires everyone to be involved, from individual consumers to global corporations, and from local authorities to national governments. When we all work together we can make progress, as happened in Paris in 2015.

We support the ambitions of the historic Paris Agreement, but the pledges made then and the actions taken since will not be enough to prevent a 2°C rise. To help meet the challenge, we believe carbon must be priced – and only governments can do that.

Put a price on carbon and you incentivize everyone to use less energy. You incentivize the use of lower carbon fuels. And you incentivize innovation and the hunt for all kinds of ways to lower emissions. All my experience over the past 40 years in the energy business tells me that when you inspire people, human ingenuity will find solutions.

It won't be easy, true progress seldom is, but BP will never stop working to help the world keep moving and, more importantly, keep advancing.



Bob Dudley
Group chief executive, BP

The changing energy mix

The demand for energy continues to grow – largely driven by rising incomes in emerging economies and a global population heading towards nine billion by 2040. At the same time, the energy mix is changing as technology advances, consumer preferences shift and policy measures evolve.

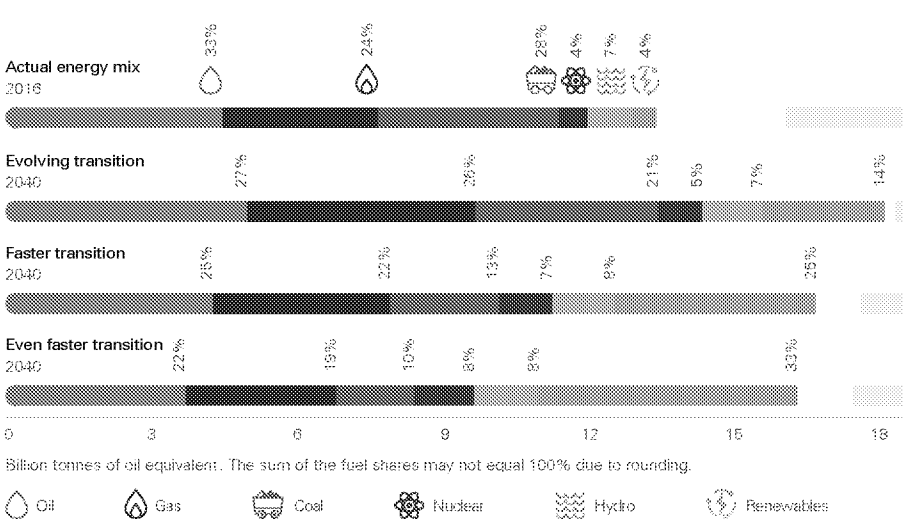
Renewables are now the fastest-growing energy source in history and we estimate that they could account for 14% of all energy consumption in 2040 – if not more. That said, oil and gas could meet at least 40% of the world's energy needs in 2040 – even on a course that's consistent with the Paris goal of limiting global warming to less than 2°C.

Gas offers a much cleaner alternative to coal for power generation and can lower emissions at scale. It also provides a valuable back-up for renewables intermittency, delivers heating at the high temperatures required by industry and is increasingly used in transportation.

Oil is the primary fuel for transport today. We expect its share of the total energy mix will gradually decline as we see more energy efficiency in traditional engines, greater use of biofuels and natural gas, and growth in fully electric and hybrid vehicles in the years ahead.

With oil and gas in high demand for years to come, it's essential that action is taken to reduce emissions from their production and use.

Energy consumption – 2040 projections



Evolving transition
In this scenario, government policies, technology and social preferences evolve in a manner and speed seen in the recent past. The growing world economy requires more energy but consumption increases less quickly than in the past.

Faster transition
This scenario sees carbon prices rising faster than in the evolving transition scenario, with other policy interventions encouraging more rapid energy efficiency gains and fuel switching.

Even faster transition
This scenario matches carbon emissions similar to the International Energy Agency's sustainable development scenario, which aims to limit the global temperature rise to well below 2°C.

Visit
bp.com/energyoutlook for more information on our projections of future energy trends and factors that could affect them out to 2040.

Our strategy for the energy transition

Society is demanding solutions for more energy, delivered in new and better ways for a low carbon future. Our strategy is designed to meet this dual challenge.

Although we can't predict the future, insights from our *Energy Outlook* and *Technology Outlook* help shape our strategic thinking. We consider how policy, consumer behaviour and advances in technology could affect the pace of the energy transition and how we produce and use energy in the coming decades.

All our projections see renewables growing at a fast pace – but with oil and gas continuing to play a prominent role over the next two decades. That's why our portfolio is a balance of advantaged oil and gas, a competitive downstream, the trading of all forms of energy and a wide range of low carbon businesses.

Each year, we reinvest about one tenth of the capital employed in new opportunities. At current rates, we produce our proved reserves over 11 years on average. Our rolling programme of activity gives us significant flexibility to redefine our business as the world's energy needs evolve.

When making strategic decisions, we consider different potential medium-term supply and demand scenarios – including a faster transition to lower carbon sources. To be prepared for uncertainties and opportunities, we test whether a potential investment makes commercial sense using a range of oil, gas and carbon prices.

We believe this approach – actively planning how we can contribute to and be competitive in the energy transition – gives us resilience, whatever the pace and path the world chooses. To reinforce this belief, we base part of our long-term executive compensation on delivery of this strategy.

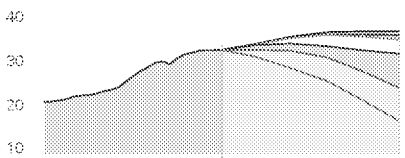
1. How do we think the energy mix could look in 2040?

Energy scenarios

We consider various scenarios, with different assumptions about policy, technology and consumer behaviour.

- Evolving transition
- Faster transition
- Even faster transition
- Ban on sale of cars with internal combustion engines
- Greater policy push for renewables
- Less policy support for a coal to gas switch

Impact on CO_2 emissions (billion tonnes)



Source: *BP Energy Outlook.*

2. How do we see energy markets evolving?

Market scenarios

We consider various market scenarios, with different assumptions about supply and demand.

Return to oil price volatility
Oil and gas demand rises lead to a supply crunch and higher prices.

Oversupply of oil and gas
Oil and gas remain cheaper in the long term.

Faster energy transition
Driven by policy and advancements in renewables and energy efficiency.

Embracing the dual challenge

3. What are our strategic priorities?

Our strategy

We pursue a strategy that's resilient to a broad range of energy and market scenarios.

Growing gas and advantaged oil in the upstream
Invest in more oil and gas, producing both with increasing efficiency.

Market-led growth in the downstream
Innovate with advanced products and strategic retail partnerships.

Venturing and low carbon energy
Pursue new opportunities to meet evolving technology, consumer and policy trends.

Modernizing the whole group
Simplify our processes and enhance our productivity through digital solutions.

4. How do our top leaders get rewarded on lower carbon progress?

Progress and reward

We reward based on the delivery of our strategy for the evolving energy landscape.

We base 20% of our longer-term share awards on progress against our strategic priorities. This includes measures on our performance in gas, renewables, venturing and renewables trading.

As an underpin, the board considers progress on issues such as reducing emissions, improving our products and creating low carbon businesses – as well as total shareholder return, safety and other environmental factors – before determining the final vesting outcome for these longer-term awards.

BP's board and executive team annually review our strategy.

Our commitment to advance a low carbon future

The world's rising demand for energy is a real opportunity to expand our business and deliver higher returns for our investors. But as we grow, our net operational emissions won't – and we will help others to curb their emissions.

We will deliver this commitment by reducing emissions in our operations, improving our products and services, and creating low carbon businesses. This is just the latest step in our 20-plus year journey – but a significant one and one we plan to build on in the years to come.

By setting tough targets and aims – and sharing them – others can monitor our progress. We'll review these regularly so we can keep them up-to-date with changes in our portfolio, protocols and other factors.

Our low carbon ambitions

Reducing
emissions in our operations

Zero
net growth in operational emissions out to 2025

3.5Mte
of sustainable GHG emissions reductions by 2025

Targeting methane intensity of
0.2%
and holding it below 0.3%

Improving
our products

Provide lower emissions gas

Develop more efficient and lower carbon fuels, lubricants and petrochemicals

Grow lower carbon offers for customers

Creating
low carbon businesses

Expand low carbon and renewable businesses

$500 million invested in low carbon activities each year

Collaborate and invest in the Oil and Gas Climate Initiative's **$1 billion** fund for research and technology

Advancing low carbon

Our accreditation programme for lower carbon activities

Visit *bp.com/targets* for specifics on these nine goals and *bp.com/energytransition* for information on our wider programme.

Reducing emissions in our operations

Targeting zero net growth in our operational emissions

The International Energy Agency estimates that energy efficiency could contribute around 40% of the emissions reductions needed to stay below the 2°C goal. We are playing our part by improving the efficiency of our existing operations and designing our new major projects to emit fewer greenhouse gases (GHGs).

We have set a sustainable emissions reductions target of 3.5 million tonnes out to 2025. Our operating businesses will deliver this through improved energy efficiency, fewer methane emissions and reduced flaring – all leading to permanent, quantifiable GHG reductions.

We are aiming for zero routine flaring by 2030, as part of an initiative by the World Bank.

And, to ensure that as our business grows, our carbon footprint does not, we'll offset any increase in emissions above 2015 levels that's not covered by our sustainable reductions activity.

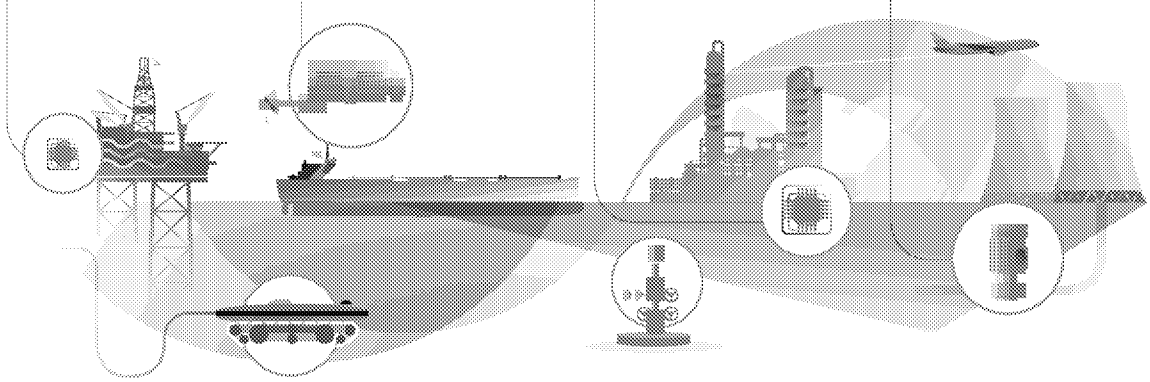
Visit *bp.com/emissions* for the specifics of these targets.

Optimizing process heat
Digital technologies are helping us to reduce energy by improving how we heat seawater for use at our Deepwater Gunashli platform in Azerbaijan.

Reducing fuel consumption
We've introduced oil tankers with more efficient engines and advanced energy management systems.

Retrofitting technology
We upgraded technology at our Cooper River petrochemicals plant in the US, which will significantly reduce the site's energy use and emissions.

Using co-generated power
We now use electricity from our co-generation facility to power the turbines used to pump water to the cooling tower at our Whiting refinery in the US.



Tackling the methane challenge

The Intergovernmental Panel on Climate Change data suggests that methane accounts for around 20% of manmade GHG emissions. Since methane is the primary component of natural gas, BP is committed to taking a leading role in addressing the methane challenge.

Methane has a shorter lifetime in the atmosphere than carbon dioxide, but it has a higher global warming potential. So, we are targeting a methane intensity of 0.2%, and holding it below 0.3%. This includes the methane emissions from our operations where gas goes to market as a percentage of that gas.

To manage our methane emissions, we use technology like infrared cameras to identify and help prevent small seeps from becoming more hazardous leaks.

Thirteen of our 22 major projects scheduled to be delivered by 2021 are gas, so we're designing them in ways that should reduce methane emissions from the outset.

We're working on this challenge with our industry peers, sharing best practice and investing in potentially breakthrough technologies. For example, we are active in the Oil and Gas Climate Initiative – whose member companies produce more than 25% of the world's oil and gas – in its aim to work towards near-zero methane emissions from the gas value chain.

And, we support research such as Princeton University's work to enhance the scientific understanding of methane and its contribution to global warming.

Visit
bp.com/methane for more information and specifics on our methane target.

Focus on Khazzan

Our Khazzan project will provide a major new source of gas for Oman, with production expected to represent around 40% of the country's total gas supply. From the start, we designed Khazzan to be inherently efficient and low in emissions. It has a central processing facility, so there's no need for processing equipment at each well site. Fewer processing sites lowers the potential for emissions.

Focus on the Lower 48

We are one of the largest natural gas producers in the US. Our Lower 48 business is responsible for around half of BP's total operated methane emissions, so we've made methane reduction here a priority.

We introduced the technique known as green completions, which captures gas that would otherwise be flared or vented during the completion and commissioning of wells. We have also been swapping out high-bleed controllers with ones that emit less methane And, by drilling horizontal wells, we reduce the number of production facilities, along with their associated emissions.

We periodically remove liquid from our wells so gas can flow. Methane can be emitted during this process, so we're using new technologies, such as enhanced automation, to reduce these emissions.

We are also trialling pumps powered by solar energy rather than gas, as well as the use of drones and truck-mounted laser sensors to detect and quantify methane leaks.

Producing more natural gas

Gas produces around half the carbon dioxide (CO_2) emissions of coal when burned to generate power. That means gas can make a major difference, as has happened in the US, where abundant use of gas from shale has helped drive the country's CO_2 emissions back down to 1990s levels.

Gas is the ideal complement to renewables as it can be a lower carbon, cost-effective back-up to the variability of wind, solar and hydropower generation.

Emitting fewer pollutants, it is also better for air quality.

Just as importantly, gas is widely used for heating homes and businesses, as well as delivering the high temperatures needed in heavy industries like steel, cement and metals.

And, gas is becoming more accessible and affordable around the world thanks to a growing global gas market connected by ship and pipeline.

BP is active in finding and producing gas, as well as its transport, storage and sale. This puts us in a good position as the gas market grows and becomes increasingly competitive. And, by tackling methane emissions, we are helping to make sure that gas is a major lower carbon resource for years to come.

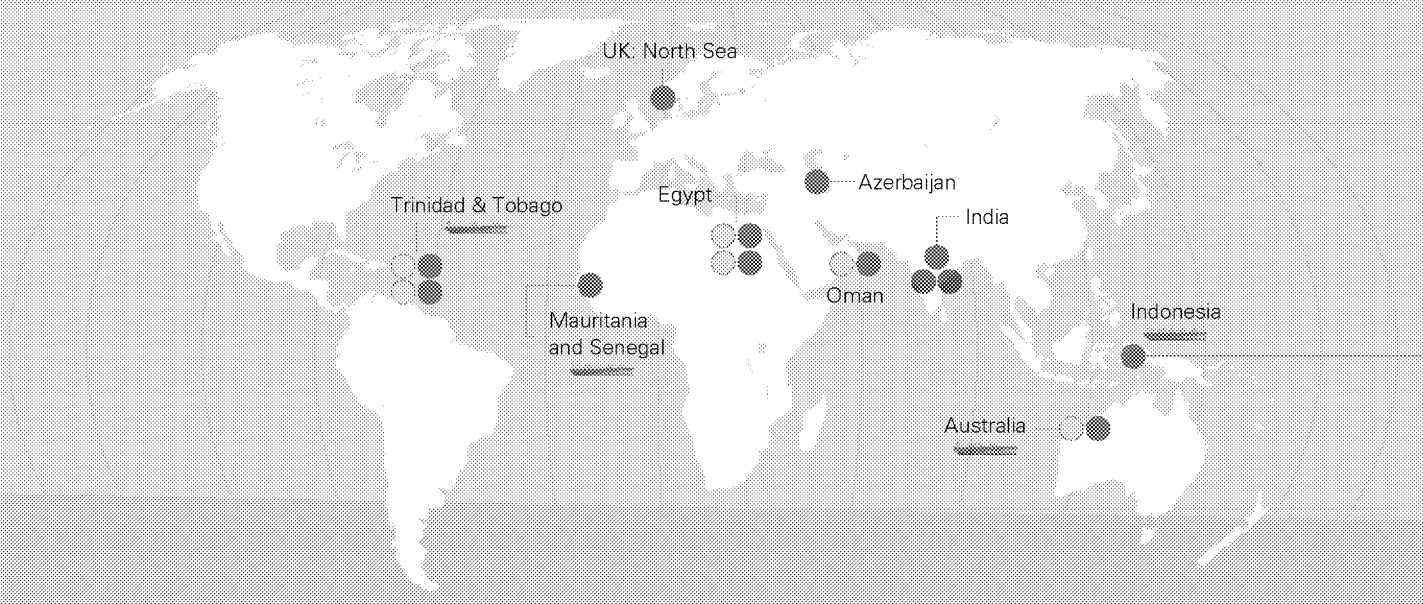
See
page 14 for information on our renewable gas fuel.

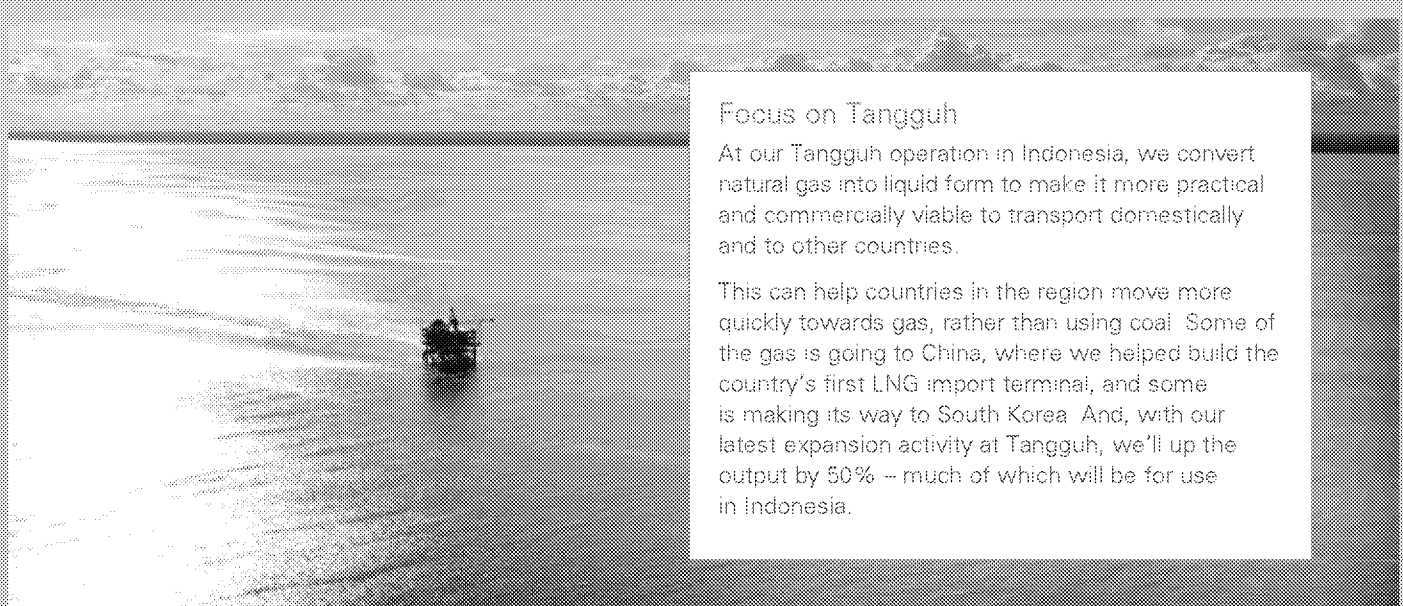
Focus on the Southern Corridor

The Southern Gas Corridor, one of the largest projects in BP's portfolio, will connect gas from the Caspian directly to Europe for the very first time. Gas will travel 3,500 kilometres from our Shah Deniz field in the Caspian Sea across five countries to Italy. We plan to deliver gas supplies to Turkey in 2018 and to European markets in 2020.

Once it reaches its peak production, this project will provide enough natural gas to meet the needs of every capital city along the Southern Corridor – more than twice over.

BP's growing natural gas portfolio





Focus on Tangguh

At our Tangguh operation in Indonesia, we convert natural gas into liquid form to make it more practical and commercially viable to transport domestically and to other countries.

This can help countries in the region move more quickly towards gas, rather than using coal. Some of the gas is going to China, where we helped build the country's first LNG import terminal, and some is making its way to South Korea. And, with our latest expansion activity at Tangguh, we'll up the output by 50% – much of which will be for use in Indonesia.

Helping consumers lower their emissions

Around 80-90% of carbon dioxide emissions from oil and gas products are from their use by consumers in transportation, power plants, industries and buildings. So one of the biggest contributions we can make to advance the energy transition is by providing products and services that help consumers lower their carbon footprint.

We provide fuel for transport, energy for heat and light, lubricants to keep engines moving and the petrochemicals products used to make everyday items as diverse as paints, clothes and packaging.

Many of our products and services have been accredited with our Advancing Low Carbon programme – see pages 20-21.

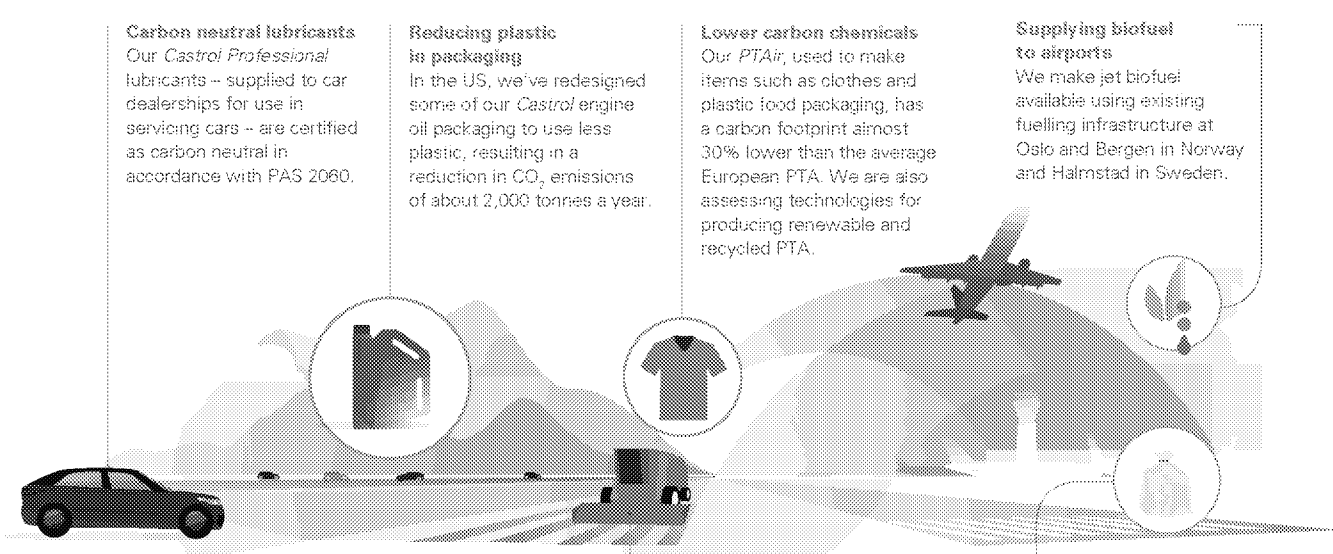
We've developed more than 20 carbon neutral products and services through the use of advanced technology and our offsetting programme. And, we offer our customers the opportunity to offset their own carbon emissions.

Carbon neutral lubricants
Our *Castrol Professional* lubricants – supplied to car dealerships for use in servicing cars – are certified as carbon neutral in accordance with PAS 2060.

Reducing plastic in packaging
In the US, we've redesigned some of our *Castrol* engine oil packaging to use less plastic, resulting in a reduction in CO_2 emissions of about 2,000 tonnes a year.

Lower carbon chemicals
Our *PTAir*, used to make items such as clothes and plastic food packaging, has a carbon footprint almost 30% lower than the average European PTA. We are also assessing technologies for producing renewable and recycled PTA.

Supplying biofuel to airports
We make jet biofuel available using existing fuelling infrastructure at Oslo and Bergen in Norway and Halmstad in Sweden.



Working with vehicle manufacturers
In Europe, Ford's EcoBoost engines are engineered with advanced *Castrol* oils, to help improve fuel efficiency.

Renewable gas from food and agricultural waste
We are the largest producer of renewable gas fuel for US transport. This fuel can reduce greenhouse gas emissions by around 70% compared with gasoline or diesel-fuelled vehicles.

Offsetting emissions with our fuel cards
Customers can use our *Aral* and *BP* fuel cards in Austria, Germany, the Netherlands and the UK to offset their carbon emissions.

Jet fuel made from household waste
We are working with Fulcrum BioEnergy to supply biojet fuel at key hubs across North America.

Expanding our renewables business

Renewables are the fastest-growing source of energy today, on course to provide at least 14% of the global energy mix by 2040. BP has been in the renewables business for more than 20 years – we're one of the largest operators among our peers and we're expanding as we see more opportunities.

Biofuels

The ethanol we produce from sugar cane in Brazil has life cycle greenhouse gas emissions 70% lower than conventional transport fuels. And, our joint venture to operate a major ethanol storage terminal with our partner Copersucar will help us expand further into Brazil's large fuels market.

We are working in partnership with DuPont on a technology called Butamax, which converts corn sugar into bio-isobutanol – a biofuel that is more energy rich than ethanol and can be blended with gasoline in higher concentrations and transported through existing fuel pipelines and infrastructure.

2.9m

tonnes of CO_2 equivalent avoided through our renewables business in 2017

Biofuels

Our ethanol production avoided emissions equal to

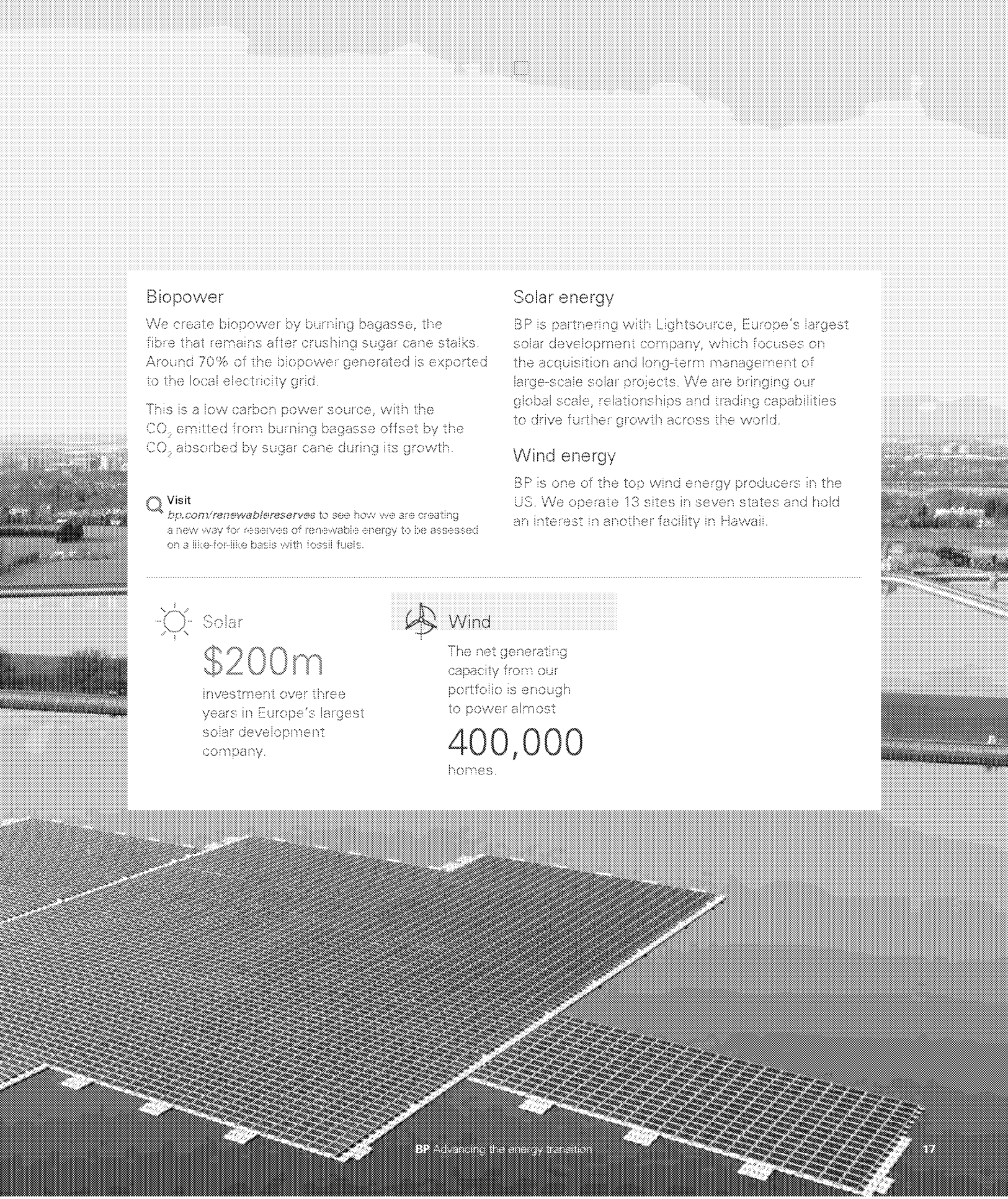
260,000

fewer European cars on the road in a year.

Biopower

70%

of biopower generated at our biofuels sites goes to the local electricty grid.



Biopower

We create biopower by burning bagasse, the fibre that remains after crushing sugar cane stalks. Around 70% of the biopower generated is exported to the local electricity grid.

This is a low carbon power source, with the CO_2 emitted from burning bagasse offset by the CO_2 absorbed by sugar cane during its growth.

Visit
bp.com/renewablereserves to see how we are creating a new way for reserves of renewable energy to be assessed on a like-for-like basis with fossil fuels.

Solar energy

BP is partnering with Lightsource, Europe's largest solar development company, which focuses on the acquisition and long-term management of large-scale solar projects. We are bringing our global scale, relationships and trading capabilities to drive further growth across the world.

Wind energy

BP is one of the top wind energy producers in the US. We operate 13 sites in seven states and hold an interest in another facility in Hawaii.

Solar

$200m

investment over three years in Europe's largest solar development company.

Wind

The net generating capacity from our portfolio is enough to power almost

400,000

homes.

Investing in low carbon ventures and start-ups

Innovation has the potential to disrupt and have big impacts. For example, one company's technology for carbon reduction in concrete could reduce manmade greenhouse gas emissions by 1%, if deployed globally.

That's why BP is investing in this company and many others, so we can learn fast and scale up where we can

We plan to invest around $200 million every year to help incubate and grow lower carbon solutions. This is all part of our near-term plan to allocate at least $500 million a year for low carbon activities, which also includes our renewables businesses and acquisitions.

We view these activities as core to our strategy – with the potential to make a real contribution to our future.

CO_2 Carbon management

With the world needing oil and gas for much of its energy for decades to come – possibly 40% of all energy used in 2040 – we are investing in ways to reduce the amount of carbon dioxide that is emitted into the atmosphere.

Enabling carbon offsets

We are one of the world's largest carbon traders and we are making investments that help businesses and other organizations offset their carbon footprint through emission-reducing projects.

See page 22 for more on our carbon trading activities.

Turning carbon into concrete

Cement production accounts for 5-7% of total global carbon emissions. We've invested in Solidia, which uses technology to produce lightweight concrete in a way that can reduce its carbon footprint by up to 70%.

Advanced mobility

By 2040 over 30% of kilometres travelled by passenger cars could be powered by electricity. And, we think more and more people will take advantage of ride sharing and car pooling.

Charging points for electric vehicles

We are partnering with FreeWire, which develops smart battery systems for fast charging of electric vehicles. And, we are piloting charging points at retail sites from the US to Europe and New Zealand.

Digitally connected convoys

We're investing in Peloton, whose technology enables two or more trucks to travel closely but safely together. This reduces aerodynamic drag, generating savings in fuel use and carbon emissions.

Bio and low carbon products

There is increasing demand for lower carbon versions of fuels, industrial materials and other products. The aviation industry, for one, expects a growth in air travel but is pledging to cut its emissions in half by 2050.

Aviation fuel from waste

Our partner, Fulcrum BioEnergy, has developed a jet fuel made from household waste that has 20% of the carbon footprint of its conventional equivalent. We will distribute and supply biojet into aircraft at key hubs across North America.

Sustainable building materials

We're working with Tricoya to produce a less carbon-intensive alternative to concrete, metals and plastics. Using acetylation to change the chemical properties of wood, we can create a weather-resistant construction material that does not swell or shrink.

Digital transformation

Artificial intelligence, faster data processing and other digital technologies have great potential for increasing efficiency and driving down emissions.

Castrol's joint venture with Onyx InSight provides engineering and software services to wind farm operators so that they can monitor the condition of wind turbines and avoid breakdowns.

Low carbon power and storage

Nearly two thirds of the projected growth in world energy demand over the coming decades could come in the form of electricity.

BP is looking at ways to meet customers' power and storage needs, for example through developing advanced battery technology.

Accrediting our lower carbon activities

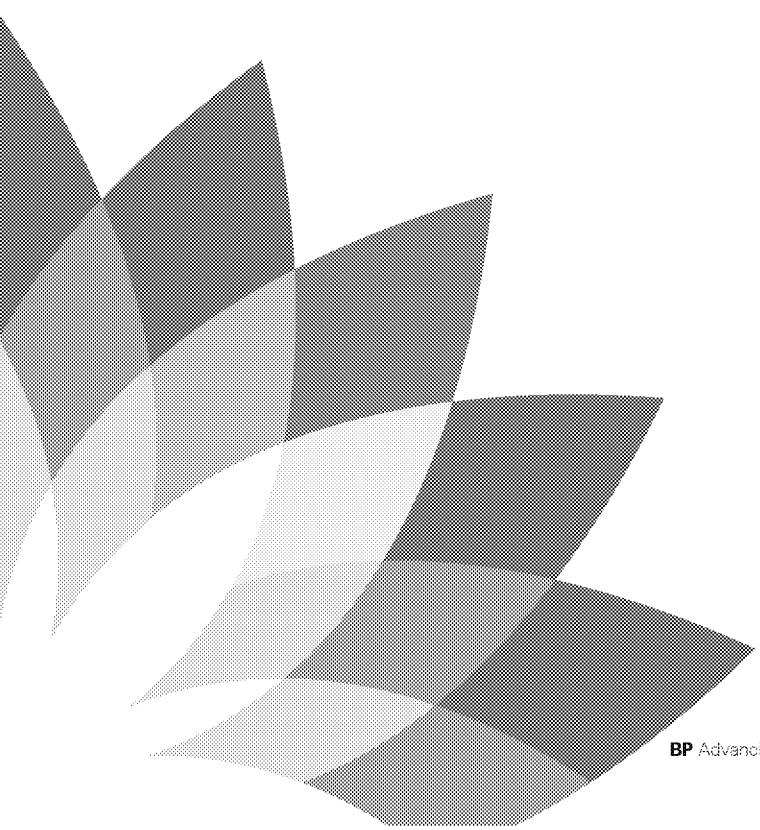
BP's new Advancing Low Carbon accreditation programme is specifically designed to encourage every part of BP to pursue lower carbon opportunities, by providing a framework for us to highlight activities that demonstrate a better carbon outcome.

Qualifying activities range from emissions reductions in our operations to carbon neutral products, from investments in low carbon technologies to our renewables businesses. We undertake these activities through our own businesses as well as in partnership with others.

Deloitte has assessed our programme and criteria and independently assured the activities and their greenhouse gas (GHG) emissions savings or offsets.

Our Advancing Low Carbon programme highlights many, but not all, of BP's actions on low carbon.

Advancing low carbon



Assessment criteria

The activities must:

- Deliver a better carbon outcome by doing one of the following:
  - Reducing GHG emissions
  - Producing less carbon than competitor or industry benchmarks
  - Providing renewable energy
  - Offsetting carbon produced
  - Furthering research and understanding to advance low carbon
  - Enabling BP or others to meet their low carbon objectives.
- Go beyond what is required to meet relevant carbon emissions regulations.
- Be either directly delivered by BP or by a BP partner.
- Be up and running.
- Comply with Advancing Low Carbon programme requirements on GHG calculation methodologies.
- Deliver a carbon outcome that is intended to be irreversible.

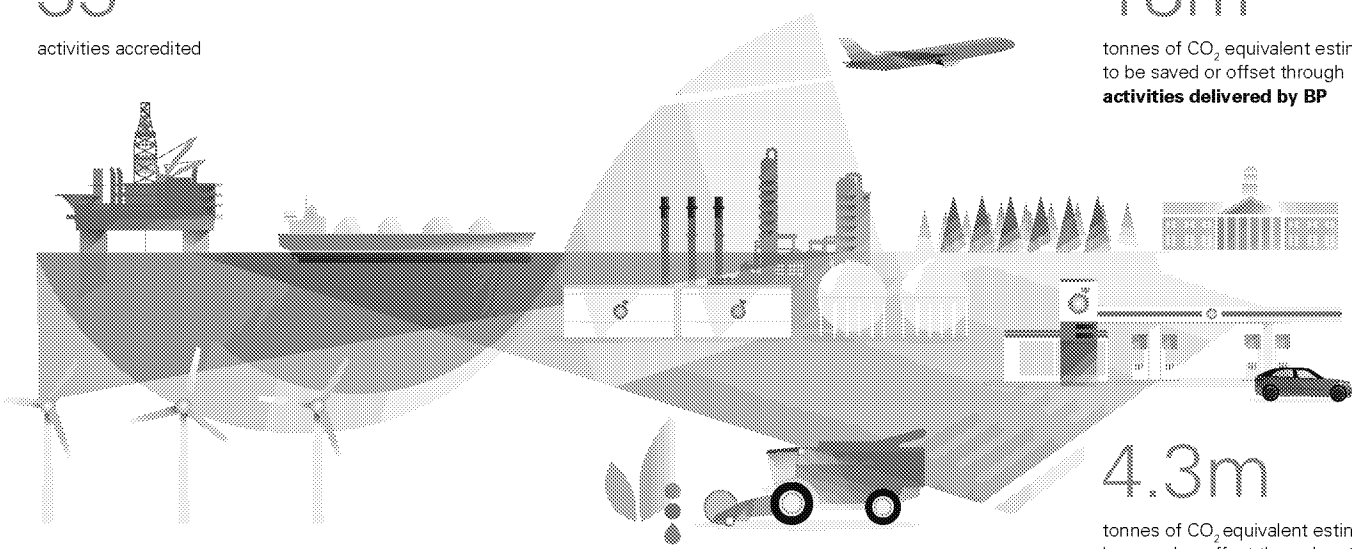
Visit
bp.com/advancinglowcarbon for more details on each activity and our accreditation programme.

33

activities accredited

18m

tonnes of CO_2 equivalent estimated to be saved or offset through **activities delivered by BP**



4.3m

tonnes of CO_2 equivalent estimated to be saved or offset through **activities delivered by BP partners**

Accredited activities in the first year of the programme

Reducing GHG emissions

- Sustainable GHG emissions reductions – actions to improve energy efficiency and reduce methane emissions and flaring in our operations.

Producing less carbon than competitor or industry benchmarks

- BP biojet – jet fuel made with recycled cooking oil.
- Oil tankers – new, more energy efficient ships.
- *Castrol* low viscosity lubricants – which help improve vehicles' fuel economy.
- Onyx InSight – investing in improving the maintenance efficiency of wind turbines.
- *PTAir* – a chemical feedstock with a lower carbon footprint than the average European PTA.

Providing renewable energy

- Brazil biofuels and biopower.
- Wind energy.

Offsetting carbon produced

- Air BP into-plane fueling services.
- *BP* and *Aral* fuel cards – help fleet customers offset their carbon emissions.
- *PTAir Neutral* – a carbon neutral chemical feedstock.
- *Castrol EDGE Bio-synthetic* and *Castrol MAGNATEC Bio-synthetic* – carbon neutral engine oils manufactured using 25% plant-derived oil compounds
- *Castrol Optigear* – carbon neutral lubricants for the wind industry.
- *Castrol Professional* – carbon neutral engine oil.
- *Castrol Transmax* – carbon neutral transmission fluids.
- *Castrol VECTON* – a carbon neutral range of lubricants for the commercial trucking industry.

Furthering research and understanding to advance low carbon

- Anhydride – a chemical feedstock with a lower carbon footprint.
- Butamax – a joint venture with DuPont to develop advanced biofuels.
- *Castrol GTX ECO* – a motor oil that delivers a CO_2 reduction over the product's life cycle, compared with *Castrol GTX Diesel* 15W-40.
- NEXCEL – an oil cell that is designed to reduce CO_2 emissions by helping oil to warm up more quickly.
- Solidia – investing in producing concrete with a lower carbon footprint.
- Tricoya Technologies – investing in producing more durable wood products.
- Carbonfree Chemicals – investing in a new technology that captures carbon emitted during cement production.
- Academic partnerships – BP supports independent research programmes at Princeton, Harvard and Tufts universities.

BP's participation in:

- Climate and Clean Air Coalition's Oil and Gas Methane Partnership.
- CO_2 Capture Project.
- Oil and Gas Climate Initiative.
- World Bank's Global Gas Flaring Reduction Partnership and Zero Routine Flaring by 2030 initiative.

Enabling BP or others to meet their low carbon objectives

- BP Global Environmental Products business – investing in forestry projects to reduce emissions and generate carbon credits.
- BP Target Neutral – developing carbon neutral products and services.
- Encourage Capital's EKO Green Carbon Fund – investing in forestry projects that generate carbon offsets.

We estimate the total emissions saved or offset from the accredited activities using a variety of methodologies and baselines. The figures are aimed at illustrating the impact of the programme as a whole rather than a quantification of specific savings made by BP or by BP partners. The scope of accredited activities is wider than, and unaligned with, the scope of activities giving rise to emissions within BP's operational emissions boundary. Therefore, the figures are not directly comparable to BP's reported emissions.

Using carbon offsets to support our low carbon ambitions

With carbon offsets, a reduction in greenhouse gas emissions in one place compensates for emissions made elsewhere. BP is a leader in developing and using offsetting programmes. And, we will use offsets to underpin our low carbon ambitions.

Carbon offsets are created through investment in activities that reduce greenhouse gas (GHG) emissions or absorb carbon dioxide (CO_2). That could be initiatives that provide lower carbon alternatives, like renewable energy or cookstoves to replace open fires. Or it could be projects that protect or enhance natural resources that soak up CO_2 from the atmosphere – such as land and forests.

Carbon offsetting is essential for reaching the Paris goals – and we consider it a valuable supplement to our own emissions reduction activities.

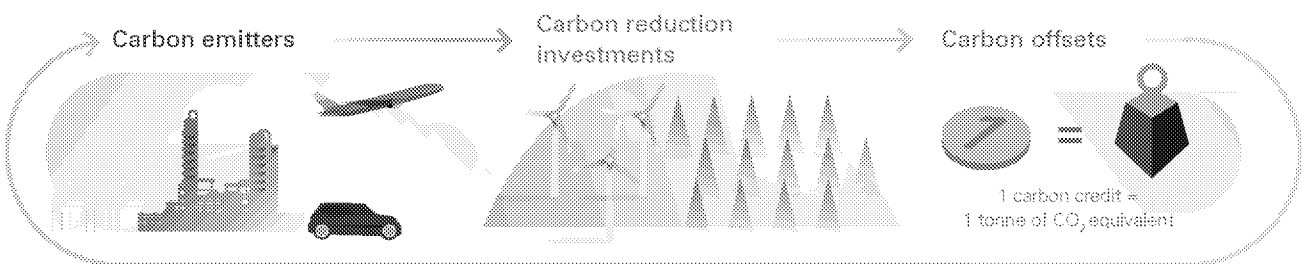
Our Target Neutral programme provides a means for individuals and organizations to reduce their carbon footprint through offsetting. Over the past 10 years, we have built up significant expertise in carbon management projects around the world and have helped our customers offset more than three million tonnes of CO_2 equivalent.

We plan to offset any increase in our operational emissions above 2015 levels that's not covered by our sustainable reductions activity. This means that, out to 2025, we'll have no net increase in our carbon footprint, even as our production grows.

We currently offer more than 20 carbon neutral products and services to our customers, using Target Neutral to offset the emissions.

And, we are helping to grow markets for carbon credits through the sale and purchase of credits and by increasing their overall supply. We are able to use our powerful market insights and innovative platforms to help companies meet their own emissions reduction commitments, while providing income to the people who run the projects. In 2017 alone, we financed low carbon projects that resulted in emissions reductions of more than 12 million tonnes of CO_2 equivalent.

How offsetting works



BP helps people and companies reduce their carbon footprint for:

- Compliance needs
- Corporate responsibility
- Individual choice

BP supports a diversity of projects, including:

- Forest protection
- Biogas initiatives
- Cookstoves

BP uses carbon credits to:

- Offset our own operational emissions growth
- Make some of our products carbon neutral
- Trade with companies to meet their compliance and voluntary needs

Advocating for better policy and clearer incentives

Carbon pricing

We believe that carbon pricing is the most effective way to incentivize everyone – energy producers and consumers alike – to play their part in reducing emissions. It makes energy efficiency more attractive and low carbon solutions, such as renewables and carbon capture, use and storage (CCUS), more cost competitive.

We expect around two thirds of BP's direct emissions will be in countries subject to emissions and carbon policies by 2020.

BP has played a major role in helping governments design their trading systems and we've been active as a trader in the world's current emissions trading systems since their inception.

Pricing carbon adds a cost to our industry's production and our products – but it also benefits the sector by providing a roadmap for future investment and a level playing field for all energy sources.

We are members of the US-based Climate Leadership Council and the International Carbon Pricing Leadership Coalition – two groups that advocate for carbon pricing.

Internal carbon price

To help anticipate greater regulatory requirements affecting our GHG emissions, we use a carbon cost when evaluating our plans for large new projects and ones where there could be material emissions costs. In industrialized countries, our internal carbon price is currently $40 per tonne of CO_2 equivalent, and we also stress test at a carbon price of $80 per tonne.

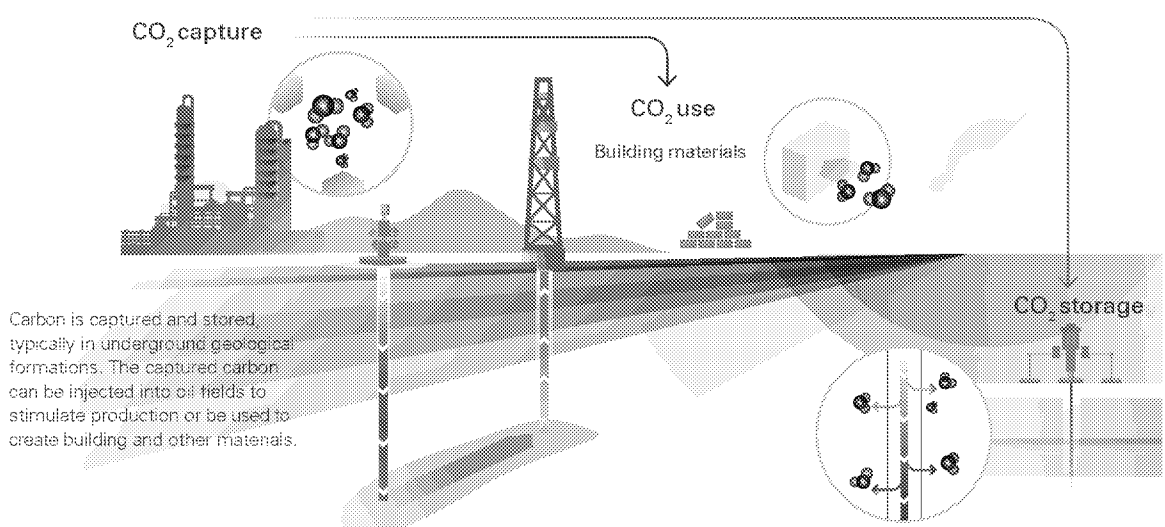
Carbon capture, use and storage

We believe CCUS has a vital role to play in meeting the objectives of the Paris Agreement. It can achieve deep emissions reductions in existing power infrastructure and energy-intensive industries that rely on the use of fossil fuels.

The technology has been in use for more than 20 years, but needs governmental support – through a carbon price and other policy measures – to accelerate its deployment. Through the Oil and Gas Climate Initiative, we are working to identify the policy mechanisms that may best promote the deployment of CCUS on a regional basis.

At BP, we are exploring opportunities to deploy CCUS in our own operations, projects and products. For example, as part of a joint venture in the United Arab Emirates, we are using CO_2 from industrial processes to enhance oil recovery.

How CCUS works



As a business that operates in 70 different countries, what we do keeps millions of people warm, working and on the move all around the world. In this publication, we've set out our commitment to keep doing that while advancing progress towards a cleaner, lower carbon future.

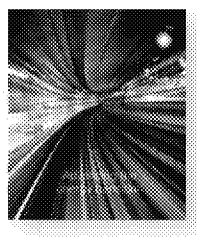
Keys to success

What you have read in these pages applies to every part of our business, from the deep sea to the desert, from rigs to retail. The experience and expertise we have acquired over decades inform our actions, our future plans and our belief that, to meet global climate goals, the world should prioritize:

- → **Reducing emissions rather than promoting any one fuel as the answer.** The world will need all forms of energy for a long time to come, so we need to make all fuels cleaner
- → **Improving energy efficiency, where the greatest reductions in emissions can be achieved.** Advances in technology for everyone – from industry to individuals – are creating huge opportunities to achieve gains over the coming years.
- → **Carbon pricing as one of the most significant steps that can be made.** The more governments can do to bring about clear, stable pricing frameworks, the greater the incentives for innovation and lower carbon choices.

No one company or sector alone can deliver a low carbon future. Everyone, from consumers to corporations to governments, needs to take responsibility. If we respond collectively, even a challenge as complex as climate change can be met. BP is dedicated to being part of the solution.

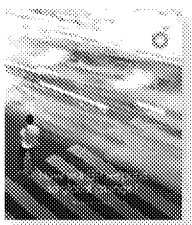
Bob Dudley
Group chief executive, BP



Advancing the energy transition

Includes the specifics of our ambitions, and more information about this report.

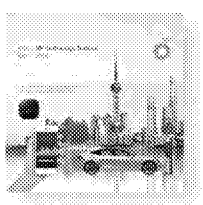
bp.com/energytransition



Sustainability Report 2017

Covers our sustainability performance with additional information online.

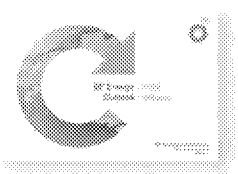
bp.com/sustainability



BP Technology Outlook

How technology could influence the way we meet the energy challenge into the future.

bp.com/technologyoutlook



BP Energy Outlook

Provides our projections of future energy trends and factors that could affect them out to 2040.

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Message

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Sent: 10/24/2017 8:24:59 PM
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CC: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: DOJ Amicus Brief for Christian v. Atlantic Richfield Company
Attachments: canonb05a04.enrd.doj.gov_Exchange_11-15-2016_15-34-47.pdf; FINAL AS FILED ARCO Short Version.pdf

Doug,

It was a pleasure to talk with you today. As a follow up to our conversation, I have attached the amicus briefs that the DOJ filed in the Christian v. Atlantic Richfield litigation with the Montana Supreme Court. DOJ filed an initial amicus brief dated November 15, 2016. This is a well written brief that explains the issues of concern for the EPA. Subsequently, the DOJ submitted a shorter version dated December 8, 2016 in order to comply with a 5000 word limit.

I suggest that you read the brief dated November 15, 2016 since it provides a more fulsome explanation of why the DOJ opposes the landowners' claim for restoration damages.

The brief was submitted by Matt Oakes, who also argued the DOJ's points before the Montana Supreme Court in April, 2017. Paul Logan and Andy Lensink supported this effort for EPA Region 8 legal team.

Let me know if I can provide any additional information. Separately, I will contact your office to schedule a meeting in Denver to discuss ideas to progress the Montana superfund sites.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone **Personal Matters /**

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 16-0555

ATLANTIC RICHFIELD COMPANY
Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE HONORABLE KATHERINE M. BIDEGARAY
Respondent,

UNITED STATES' AMICUS BRIEF

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Tohono O'odham Nation v. City of Glendale,
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STATEMENT OF THE CASE

On October 5, 2016, this Court granted a writ of supervisory control for the limited purpose of considering the District Court's August 30, 2016 Order in *Christian v. Atlantic Richfield Co.*, DV-08-173 BN (2d Jud. Dist.), and invited the United States Environmental Protection Agency (EPA) to file an *amicus* brief addressing whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75, bars or otherwise prevents a claim for restoration damages under Montana law that a group of 98 landowners has filed against the Atlantic Richfield Company (ARCO). *See* Oct. 5, 2016 Order. As explained below, CERCLA expressly bars the landowners' claim for restoration damages and also preempts that claim. Additionally, any response action that the landowners propose to implement at the Anaconda Superfund Site (Site) would require EPA authorization, which has not been granted.

STATEMENT OF ISSUES

(1) Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), withdraws court jurisdiction "to review any challenges" to EPA-selected CERCLA response actions. EPA has selected response actions for the Site; and the landowners, through their restoration-damages claim, seek to enforce a different soil cleanup level, and would impose new cleanup requirements for soil, and

seek to install underground barriers that may alter groundwater flow, change groundwater chemistry, and otherwise affect groundwater that EPA seeks to monitor and treat. Does section 113(h) of CERCLA bar the landowners' claim for restoration damages because that claim would "challenge" an EPA-selected response action?

(2) Even if section 113(h) did not bar the landowners' claim, if there is a conflict between federal and state cleanup standards, federal law prevails where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The landowners, through their restoration-damages claim, seek a remedy that both conflicts with and undermines the execution of EPA's Records of Decision (RODs). Does CERCLA preempt the landowners' claim for restoration damages where the remedy for that claim would conflict with the response action that EPA selected?

(3) Where a remedial investigation and feasibility study has been undertaken at a CERCLA site, section 122(e)(6) of CERCLA, 42 U.S.C. § 9622(e)(6), prohibits potentially responsible parties from undertaking "any remedial action" unless that action has been authorized by EPA. Potentially responsible parties are defined to include "the owner … of … a facility" or

"any person who at the time of disposal … owned or operated any facility," 42 U.S.C. § 9607(a)(1)-(2). Are the landowners, who own property at the Site, prohibited from undertaking a remedial action without EPA authorization?

STATEMENT OF FACTS

I. History of the Anaconda Smelter Site and EPA Oversight and Enforcement

Nearly 100 years of copper milling and smelting operations in and near Anaconda, Montana, resulted in widespread contamination of soils, surface water, and groundwater. *See Christian v. Atl. Richfield Co.*, 358 P.3d 131, 137-38 ¶¶ 3-7 (Mont. 2015); Record of Decision, Community Soils Operable Unit § 5.0, Sept. 1996 (CSOU ROD);[1] Record of Decision Amendment, Anaconda Regional Water, Waste, and Soils Operable Unit § 2.2, Sept. 2011 (ARWWS OU ROD Am.).[2] The mining activities severely affected about 20,000 acres of soil, polluted millions of gallons of groundwater, and produced large amounts of slag, tailings, and flue dust. Record of Decision Amendment, Community Soils Operable Unit § 2.1, Sept.

[1] The CSOU ROD is available at http://goo.gl/2qIDwM.

[2] The ARWWS OU ROD Am. is available at http://semspub.epa.gov/src/document/08/1211311.

2013 (CSOU ROD Am.).[3] The primary contaminants of concern are arsenic, cadmium, copper, lead, and zinc. *Id.*

EPA has been actively responding to hazardous-substance contamination at the Site for more than 30 years. *See generally* U.S. EPA, Fifth Five-Year Review: Anaconda Smelter Superfund Site (Sept. 25, 2015), at ES-1, https://semspub.epa.gov/src/document/08/1549381. ARCO has implemented response actions to address contamination on more than 340 residential properties and more than 11,500 acres of open space. *Id.* Significant work remains, however, including cleanup of an additional 1,150 residential yards, revegetation of 7,000 acres of upland soils, and removal and closure of waste areas, stream banks, and railroad beds. Final Residential Soils Report, August 7, 2015, available at https://semspub.epa.gov/src/document/08/1549208; Fifth Five-Year Review, Table 10-1 at 10-7. EPA estimates that ARCO will complete this work by approximately 2025, though monitoring and maintenance work will continue indefinitely. Fifth Five-Year Review, Table 10-7 at 10-58.

EPA and the Montana Department of Health and Environmental Sciences (now the Montana Department of Environmental Quality, or MDEQ) began negotiating with ARCO in 1982 to clean up the Site, including extensive

[3] The CSOU ROD Am. is available at http://semspub.epa.gov/src/document/08/1280693.

investigations prior to developing final cleanup plans. These investigations involved characterizing soils, surface water, groundwater, and solid wastes across the entire Site, to delineate contamination. CSOU ROD Am. Part II §§ 2.1, 8.0; *see also* ARWWS OU ROD Am. §§ 1.5, 2.1.

Based on those investigations, EPA divided the Site into five Operable Units (OUs), each of which relates to a different medium (such as soils or groundwater) or geographic area. *See* Fifth Five-Year Review Report at ES-1 – ES-2. EPA response actions at two OUs directly impact the landowners' property: Community Soils (CSOU), which primarily addresses residential yards contaminated with arsenic and lead in Anaconda, Opportunity, and the surrounding area; and Anaconda Regional Water, Waste, and Soils (ARWWS OU), which addresses a variety of soil, surface water, and groundwater contamination issues throughout the Site. *See generally* CSOU ROD; *see also* Record of Decision, ARWWS OU, Sept. 1998 (ARWWS OU ROD).[4] The CSOU and ARWWS OU RODs, and the two accompanying amendments to these RODs, total more than 1,300 pages and provide a detailed explanation of the science and engineering necessary to implement aspects of the cleanup. These planning documents,

[4] The ARWWS OU ROD is available at http://goo.gl/DWz1pF.

including the supporting remedial investigation and feasibility studies, cost tens of millions of dollars to develop.

EPA issued the CSOU ROD in 1996 and the ARWWS OU ROD in 1998. As required under sections 113(k) and 117 of CERCLA, 42 U.S.C. §§ 9613(k) & 9617, and regulations that EPA promulgated thereunder, 40 C.F.R. §§ 300.430(c), (f)(3), 300.435(c), EPA sought public comment before selecting the remedies. Both RODs and their amendments provide for continued monitoring and sampling and allow EPA to refine its selected remedy. ARWWS OU ROD §§ 9.6, 9.7; ARWWS OU ROD Am. § 6.4.5.

The CSOU cleanup is ongoing. Based on extensive evidence and explanation, the CSOU ROD establishes an action level of 250 parts per million (ppm) for arsenic in residential yards and requires removal and replacement of up to 18 inches of soil in yards testing above that level. CSOU ROD §§ 4.0, 9.1. The excavated soil must be placed at an EPA-approved on-site soil management area. CSOU ROD Am. § 6.1. The CSOU ROD also requires implementing institutional controls (legal requirements minimizing human exposure) and educating residents regarding potential exposure risks. CSOU ROD § 9.1. EPA amended the CSOU ROD, with MDEQ's concurrence, in September 2013. The amendment added a component for lead remediation, requiring cleanup of residential yards with lead

concentrations above 400 ppm to a depth of 12 inches, added cleanup levels for arsenic and lead in accessible interior dust, and expanded institutional controls. *Id.* Part I.

The ARWWS OU ROD originally established an arsenic action level of 18 parts per billion (ppb) for groundwater and surface water, ARWWS OU ROD § 6.1, which was lowered in a September 2011 ROD amendment to 10 ppb, consistent with updated federal and state standards. ARWWS OU ROD Am. § 3.1. EPA and MDEQ further determined that it was technically impracticable to restore contaminated groundwater in the South Opportunity alluvial aquifers that are the focus of the landowners' claims, and instead decided to implement source-control measures and a domestic-well monitoring and treatment program. The agencies also require ongoing water-quality monitoring to determine whether additional remedial action may be necessary in the future. ARWWS OU ROD Am. § 6.4.5.

EPA considered construction of an underground Permeable Reactive Barrier (PRB), similar to the barrier proposed by the landowners, along Willow Creek for collecting and treating groundwater south of Opportunity to protect surface water in Willow Creek to the south and east of Opportunity. ARWWS OU ROD Am. § 6.4.2.1; ARWWS OU ROD Am. Responsiveness Summary § 3.0. EPA concluded, however, that this approach would not necessarily achieve the human health

standard in Willow Creek and would not eliminate exceedances of arsenic in downstream receiving waters. *Id.* § 6.4.3.1 & Responsiveness Summary § 3.0. EPA also determined that it was technically impracticable to reduce arsenic concentrations below 10 ppb in shallow groundwater in the South Opportunity aquifer, because of widespread arsenic contamination in both surface and groundwater from contaminated soil and seasonally saturated conditions. *Id.* § 6.4.1. EPA therefore did not select below-ground structures to address groundwater arsenic concentrations.

II. The Landowners' Proposed Restoration Plan

The landowners seek recovery of, among other things, "restoration damages." 3d Am. Compl. ¶ 43(E). Under Montana law, restoration damages redress an injury to property, and may exceed the diminution in market value of property caused by the particular injury. *See Lampi v. Speed*, 261 P.3d 1000, 1004 ¶ 21 (Mont. 2011); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086-88 ¶¶ 28-31, 38 (Mont. 2007). To prevent a windfall, Montana requires a plaintiff asserting a claim for restoration damages to show that any award of such damages will actually be used to abate the injury. *Sunburst*, ¶ 40-43; *Lampi*, ¶ 31.

The landowners submitted reports from two experts in support of their restoration-damages claim. Dr. Richard Pleus opined that EPA's selection of a 250 ppm residential-soil action level for arsenic should be lowered to 8 ppm. Pleus Report iv-v, 57 (Apr. 12, 2013); *see also* Pleus Addendum at iv, 2-4.

Another expert, John Kane, set out a scope of work and estimated costs for soil and groundwater restoration. Expert Report of John R. Kane (Apr. 13, 2013) ("Kane Rep."). His residential-soil remediation recommendation provides for removing the upper two feet of soil (totaling approximately 430,000 cubic yards or 650,000 tons), transporting it to Spokane for disposal, and replacing it with clean fill. Kane Rep. 10.[5] Kane also proposes installing an 8,000-foot long, 15-foot deep, and 3-foot wide underground PRB wall up-gradient of Opportunity, as well as shorter walls "up-gradient of Crackerville properties," to address groundwater. *Id.* at 11. Kane originally estimated that the soil removal would take 20 months and installation of the PRB walls four to six months, at a total cost of approximately $101 million. *Id.* at 11, Table 1. He updated his estimates in a May 2, 2016 letter and through additional supplemental disclosures, revising the estimated soil tonnage to be excavated and added costs associated with project

[5] In a more recent addendum, Kane indicates that fill must be hauled to Missoula rather than Spokane, and that local deposition may be possible. Kane May 2, 2016 Supp. Disclosure.

oversight ranging from $38 million to $50 million, depending on the volume of contaminated soil to be deposited locally, rather than in Spokane or Missoula. Kane May 2 Rep. at 5; Kane Sept. 2014 Supp. Disclosure.

STANDARD OF REVIEW

EPA adopts the Standard of Review set out in Petitioner's brief.

SUMMARY OF ARGUMENT

When Congress passed CERCLA, it narrowly circumscribed when and how to challenge an EPA-selected remedy and provided EPA with authority to review and approve remedial actions undertaken by potentially responsible parties. It did this to ensure that contaminated sites are cleaned up efficiently and without delay.

Specifically, CERCLA section 113(h) expressly bars "any challenges" to a removal or remedial action selected under CERCLA section 104. *See* 42 U.S.C. §§ 9604, 9613. The landowners' restoration-damages claim challenges EPA's selected response actions at the Site because the landowners would require different cleanup standards and actions for soil cleanup, and require installation of underground groundwater barriers, which could undermine EPA's cleanup approaches. Section 113(h) prohibits this claim because it would impose different response actions than those selected by EPA.

Additionally, the doctrine of conflict preemption independently bars ARCO's restoration-damages remedy. Congress delegated the President authority to set cleanup levels and select response actions. Implementing the landowners' restoration-damages remedy would undermine Congress's approach, and aspects of the landowners' proposed remedy conflict with EPA's response action. Because Congress intended to supersede these types of non-federal remedies, the doctrine of conflict preemption bars the landowners' proposed cleanup.

CERCLA section 122(e)(6), 42 U.S.C. § 9622(e)(6), requires EPA authorization of any remedial action at a cleanup site by potentially responsible parties where EPA has already initiated a remedial investigation and feasibility study. The landowners own property at the Site, and the District Court did not properly assess whether the landowners are "potentially responsible parties" under CERCLA. It is likely that some, if not all, of the landowners are potentially responsible parties. No landowner has sought EPA approval to undertake any remedial action at the Site. EPA is unlikely to approve the landowners' approach, and no court should assume that the landowners' proposed remedy could be implemented. Thus, the landowners' proposed remedy is not a reliable basis for an award of restoration damages.

The landowners' claim for restoration damages, which under Montana law would require landowners to use damages to abate the injury in a manner inconsistent with EPA's selected remedy, is exactly the type of challenge Congress intended to prevent.

ARGUMENT

As authorized by CERCLA, EPA has selected response actions at the Site. Over the course of more than three decades, EPA has invested millions of dollars in agency resources and thousands of hours of employee time, and has required ARCO to spend hundreds of millions more characterizing the Site, developing RODs, and cleaning the Site. EPA's RODs and ROD amendments exceed 2,000 pages, and the remedy-selection process is dynamic and continues to respond to public concerns and new data. For example, EPA significantly amended the RODs in 2011 and 2013 based on new information. The remedy-selection and implementation processes account for a wide range of technical, scientific, and community concerns. EPA is actively implementing those processes at the Site.

Congress enacted CERCLA to provide a framework for cleanup of the most contaminated hazardous-waste sites in our nation. The statute's goal is to protect public health and the environment from the release of hazardous substances.[6]

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[6] *See* 40 CFR § 300.430; *see also Voluntary Purchasing Grps., Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989); *O'Neil v. Picillo*, 682 F. Supp. 706, 726 (D.R.I.

Given the number of people and the wide range of interests impacted by the cleanup of large-scale contamination, EPA understands that people may disagree over its final remedy decision. However, EPA's responsibility is to protect human health and the environment based on sound science. It is vital that cleanups proceed expeditiously once EPA selects a remedy. Congress was concerned that consideration of the same broad interests that make for a robust remedy-selection process should not work to prevent EPA's selected remedy from moving forward once EPA selects a cleanup plan.

Congress included statutory provisions such as CERCLA's section 113(h), 42 U.S.C. § 9613(h), and section 122(e), 42 U.S.C. § 9622(e), to ensure that an EPA-selected cleanup moves forward without obstruction, delay, and the diversion of resources accompanying judicial challenge and litigation-based additional cleanup requirements and expenses. Congress has made it abundantly clear that only EPA has authority to establish both the cleanup levels and the response actions required to achieve those cleanup levels at a Superfund site. No matter how well intentioned, any attempt to impose conflicting cleanup standards and response actions is prohibited by CERCLA.

1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 n.7 (2d Cir. 1985).

I. Section 113(h) of CERCLA Prohibits the Landowners' Claim for Restoration Damages.

CERCLA bars any claim for restoration damages that constitutes a "challenge" to EPA's ROD. *See id.* § 9613(h). The Ninth Circuit has found this language to be "clear and unequivocal," and "amount[ing] to a blunt withdrawal of … jurisdiction" for "any challenges" to an ongoing CERCLA response action, including any attempt to interfere with, strengthen, or control the cleanup or remedy. *McClellan Ecological Seepage Situation*, 47 F.3d 325, 328 (9th Cir. 1995) (internal citations omitted). Here, the landowners' claim for restoration damages poses a prohibited challenge because it would (1) impose more stringent cleanup levels, (2) impose additional requirements, and (3) require approaches to groundwater remediation and soil disposal that directly conflict with EPA's ROD.

A. The Landowners' Restoration Damages Claim Is an Impermissible Challenge to EPA's Ongoing Cleanup of the Anaconda Smelter Site.

The section 113(h) bar applies to any claims that in their effect "challenge[] any removal or remedial action selected under section 9604 of this title" or seek "to review any order under section 9606(a) of this title." 42 U.S.C. § 9613(h). In enacting CERCLA, Congress made an affirmative choice to prioritize the expeditious cleanup of hazardous substances and to ensure that litigation would not interfere with such cleanup actions.

The District Court here held that the restoration-damages claim could proceed to trial because a claim challenges EPA's cleanup "*only* if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup." August 30 Slip Op. at 9 (emphasis added) (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000)). This holding is erroneous, mischaracterizes Ninth Circuit law, and reflects an overly narrow view of section 113(h). In the case cited by the District Court, *ARCO Environmental Remediation*, the Ninth Circuit held only that a claim regarding the right to access public information about a cleanup was not a "challenge" because that claim was not, in any way, related to the goals of the challenged cleanup. *Id.* The Ninth Circuit did not hold that termination or delay was *necessary* to trigger section 113(h). Rather, it recognized, in dicta, that termination or delay of an EPA-mandated cleanup was *sufficient* to trigger the section 113(h) bar.[7] *See* 213 F.3d at 1115.

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[7] Section 113(h) states that "[n]o Federal court shall have jurisdiction … under State law … to review any challenges to removal or remedial action …." 42 U.S.C. § 9613(h) (emphasis added). The landowners did not argue in district court that section 113(h) is inapplicable to state courts, but state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim. CERCLA section 113(b) gives "the United States district courts" "exclusive original jurisdiction over all controversies arising under [CERCLA] …." *Id.* § 9613(b) (emphasis added). The Ninth Circuit has explained

The District Court should have dismissed the restoration-damages claim because section 113(h) bars claims that challenge an EPA cleanup. Most courts have correctly concluded that any suit that will "impact the implementation" of the government's selected CERCLA response action constitutes a "challenge" within the meaning of section 113(h). *See Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990). While Congress did not intend to bar all state-law claims related to hazardous substances, *see New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243-44 (10th Cir. 2006) (citing cases), many courts have correctly found that Congress did intend to bar attempts to apply *any* law that even indirectly works to control, alter, or interfere with an EPA-selected remedy, or that otherwise affects the goal of the remedy. *See McClellan*, 47 F.3d at 330. Even claims that purport to strengthen EPA's selected remedy are barred. *Id.* (holding that a claim challenges a CERCLA cleanup under section 113(h) if it "interfere[s] with the remedial actions selected

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that section 113(h) speaks in terms of actions brought in federal courts because Congress required CERCLA controversies be litigated in federal courts. *See Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999) ("We believe Congress only removed federal court jurisdiction from 'challenges' to CERCLA cleanups because only federal courts shall have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place."); *see also O'Neal v. Dep't of the Army*, 742 A.2d 1095, 1100-01 (Pa. Super. Ct. 1999) ("[T]he present claim against the United States must be pursued in strict accordance with the waiver of sovereign immunity; that waiver is found in CERCLA and CERCLA limits jurisdiction to the United States district courts.").

under CERCLA," "seeks to improve on the remedial actions selected under CERCLA section 104," or "seeks to improve on the CERCLA cleanup"); *see also United States v. City & County of Denver*, 100 F.3d 1509, 1513-14 (10th Cir. 1996) (recognizing that Denver's attempts to impose zoning requirements that conflict with EPA cleanup are barred by CERCLA); *Town of Acton v. W.R. Grace Co.*, No. 13–12376–DPW, 2014 WL 7721850 (D. Mass. Sep. 22, 2014) (rejecting attempt to impose additional municipal groundwater cleanup standards).

A "challenge" includes actions that are "related to the goals of the cleanup." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Courts have even barred claims seeking to enforce other federal laws and state laws that attempt to supplement EPA's CERCLA remedy. *See, e.g., Diamond X Ranch, LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1021 (D. Nev. 2014) (barring claims seeking to compel compliance with the Clean Water Act and Nevada's Water Pollution Control Act). The Ninth Circuit has made clear that the prohibition of section 113(h) applies equally to both federal and state actions because "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; *see also ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *McClellan*, 47 F.3d at 328; 42 U.S.C. § 9613(b) (providing that

the federal courts "shall have exclusive original jurisdiction over all controversies arising under" CERCLA).

In *McClellan,* the Ninth Circuit ruled that a suit seeking to impose additional reporting requirements would "second-guess" EPA's determination and interfere with the remedial action selected, and was accordingly barred by section 113(h). 47 F.3d at 329-30. While recognizing that "every action that increases the cost of a cleanup or diverts resources or personnel from it does not thereby become a 'challenge' to the cleanup," the court concluded that the plaintiffs' desired remedy was "directly related to the goals of the cleanup itself" and effectively sought "to improve on the CERCLA cleanup," thereby constituting a challenge to the cleanup. *Id.* at 330. Similarly, in *Razore*, the court held that section 113(h) barred the plaintiffs' claims regarding EPA's cleanup of a former landfill, which amounted to an "attempt to dictate specific remedial actions and to alter the method and order for cleanup." 66 F.3d at 239-40; *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220-23 (9th Cir. 2013) (barring a citizen suit seeking penalties for past noncompliance with withdrawn unilateral administrative order in ongoing cleanup); *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995) (holding that health assessment activities at NPL site were protected by section 113(h), and barring claim that defendants had a duty to initiate a health-

surveillance program); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995) (holding that action for compensatory damages but not injunctive relief could go forward, because "resolution of the damage claim would not involve altering the terms of the cleanup order"); *ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115 (summarizing the court's prior holdings under section 113(h)); *Villegas v. United States*, 926 F. Supp. 2d 1185, 1196 (E.D. Wash. 2013) ("CERCLA's broad jurisdictional bar applies to any suit that challenges any aspect of a CERCLA removal or remediation action, regardless of whether the suit purports to be based on CERCLA.").

Other circuits have reached similar holdings. The Tenth Circuit held that a state public-nuisance and negligence suit seeking an unrestricted award of money damages was barred by section 113(h). *New Mexico*, 467 F.3d at 1249-50. The court pointed out that the money damages "would be available only to restore or replace the injured natural resource," much as the landowners' desired restoration-damages award must be used to restore their property as a matter of Montana law, and would necessarily "substitute a federal court's judgment for the authorized judgment of both the EPA and [the State]." *Id.*; *see also Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002) (holding that a suit seeking relocation of residents constituted a challenge to a CERCLA cleanup);

Cannon v. Gates, 538 F.3d 1328, 1335-36 (10th Cir. 2008) (barring a suit seeking injunctive relief ordering remediation of plaintiffs' property).

The District Court incorrectly distinguished the Tenth Circuit's decision by drawing a distinction between common-law and statutory claims. Aug. 30 Slip Op. at 10. But CERCLA section 113(h) does not focus on the nature of the underlying cause of action. Rather, it requires courts to assess the impact of the non-federal remedy (here, the restoration-damages claim) to determine if that remedy poses a prohibited "challenge." *See* 42 U.S.C. § 9613(h). *New Mexico*, along with *McClellan*, *Razore*, and the other cases cited above, shows how courts have assessed what constitutes a prohibited challenge. There is no doubt that many common-law claims survive, as indicated by the legislative history cited by the District Court. Aug. 30 Slip Op. at 13-14. For example, state-law claims for personal injury or diminution in value of property may not amount to a challenge to EPA's response action. The express statutory language of CERCLA, however, makes clear that no claim survives if it seeks to challenge or has the effect of challenging EPA's ROD.

These readings of the scope of section 113(h) are dictated by the broad language used by Congress. Congress emphatically barred "*any* challenges to removal or remedial action … in *any* action," 42 U.S.C. § 9613(h) (emphasis

added); and the United States Supreme Court recognizes the comprehensive scope of the term "any." *See United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *see also United States v. James,* 478 U.S. 597, 605 (1986) ("Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction" (emphasis in original)). The sweeping nature of Congress's word choice supports a broad reading of the language of section 113(h).

Legislative history also supports a broad reading of section 113(h). The Chairman of the Senate Judiciary Committee explained:

> The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the actions that are performed by EPA. The section covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986). Such an intent to prohibit review of "all lawsuits" under "any authority," and to cover "all issues," supports the conclusion that section 113(h) bars the landowners' challenge to EPA's ROD.

Finally, actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA. *See* 42 U.S.C. § 9622 (describing various types of agreements EPA may enter with liable

parties); *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013) ("Congress sought through CERCLA … to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation.") (quoting *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992)). The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations.

Importantly, Congress also provided mechanisms to challenge EPA's ROD. Those mechanisms are listed in section 113(h). For example, if the landowners believe that EPA's remedy is not sufficiently protective, they may bring a citizen suit under 42 U.S.C. § 9659. *See id.* § 9613(h)(4). By barring litigation that challenges a cleanup plan, section 113(h) ensures that EPA, state agencies, and potentially responsible parties participating in a cleanup can develop and implement an adequate and fully realized cleanup plan. Accordingly, this Court should rule that section 113(h) prohibits the landowners' restoration-damages claim because it challenges EPA's response-action decisions.

B. As a Factual and Practical Matter, Implementing the Landowners' Remedy Will Undermine EPA's Ability to Implement Its Own Remedy.

In the prior section, we address law surrounding the nature of a "challenge" under section 113(h). Here, we focus on how the landowners' claim impacts EPA's remedy at the Site. Under Montana law, the landowners must use any restoration-damages award to restore the affected properties. It follows that obtaining restoration damages under state law necessarily means implementing a cleanup action different from the one selected by EPA. The landowners' experts take issue with the cleanup standards selected by EPA, seeking to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA. The landowners' experts also proposed actions that differ from those EPA has required, including: (1) excavating to two feet rather than EPA's chosen depth of 18 inches within residential areas; (2) transporting the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA; and (3) constructing a series of underground trenches and barriers for capturing and treating shallow groundwater. The landowners' experts' reports are not detailed, but do indicate that aspects of those plans are a dramatic departure from EPA's ROD requirements. Given the ongoing cleanup at the Site, the landowners bear the burden of showing consistency with section 113(h)—any missing details weigh in favor of dismissing the landowners' claim.

The District Court, disregarding the 1150 properties that remain to be cleaned, appeared to rely heavily on ARCO's representation that the cleanup of the landowners' residential yards will be finished by November 1, 2016, to support its conclusion that the landowners' supplemental restoration requirements will not interfere with ongoing ROD requirements. Aug. 30 Slip Op. at 8. The District Court's conclusion ignores the full impact of permitting the restoration claim to go forward. Allowing individual property owners to divert cleanup resources from the implementation of EPA's ROD during the course of an active cleanup is a direct conflict with EPA's cleanup process. The remediation goals of the CSOU ROD, for example, include minimization of dust transfer, bioavailablity of lead, and soil ingestion. CSOU ROD Am. at II-11. Once the EPA remedy at the landowners' properties is complete, the completed yards are either capped or backfilled with clean soil. *See, e.g.*, CSOU ROD Am. II-18 – II-19 (setting residential-soils requirements including a "soil swap" and ensuring "replacement with clean soil and a vegetative … or other protective barrier"). Tearing up that protective cap or layer of soil directly impacts EPA's chosen remedy and could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion. Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public.

Even if the landowners attempt to coordinate their efforts with EPA, their involvement would slow the implementation and timeline of EPA's ROD and increase the agency's costs. The District Court's analysis wrongly assumed that the restoration on the Site proposed by the landowners' experts could proceed without risk or consequence. *See* Aug. 30 Slip Op. at 8. Additionally, even if EPA could coordinate with the landowners, recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres.

The landowners' proposal to install underground reactive barriers is plainly inconsistent with EPA's cleanup, and may pose even greater risks. First, it is important to understand that water from domestic wells in the town of Opportunity is generally clean and drinkable, according to EPA's findings. ARWWS ROD Am. at 6.4.1, page 41. However, hydraulic controls (a drain-tile system) intercept arsenic contamination in shallow groundwater beneath the town of Opportunity. *Id.* EPA has concluded that the natural conditions in the underground aquifer, combined with the existing hydraulic controls, are currently protecting Opportunity's groundwater. ARWWS ROD Am. at 6.4.1. If conditions change, EPA can take additional actions that it deems appropriate to protect human health and the environment based on what it learns through monitoring. ARWWS ROD Am. at 6.4.5.

By contrast, the landowners would build several underground permeable reactive barriers. Kane Rep., Opinion 4(b), at 10. These barriers, intended to treat shallow groundwater moving toward Opportunity, would be 8,000 feet long, 15 feet deep, three feet wide, and situated upgradient of the town. *Id.* And shorter barriers would be placed upgradient of individual landowners' properties. *Id.* These barriers could change the groundwater flow in unpredictable ways, which could impact current hydraulic controls, including the functioning of existing upgradient drain tiles that keep Opportunity dry. The barriers proposed by the landowners' experts contain elements and enzymes that supposedly strip arsenic in water but could unintentionally contaminate groundwater and surface water. *Id.* In other words, the landowners' remedy could upset a balance that currently protects human health and the environment. Additionally, if EPA sampling detects elevated contamination following landowners' installation of underwater barriers, EPA will not be able to determine whether the contamination was impacted by the landowners' project, complicating potential remedial options. This situation would become even more complex if other property owners later filed similar claims and demanded construction of additional structures not envisioned by the ROD. Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids *ad hoc* addition of potentially

competing cleanup measures. The District Court took far too narrow a view of the impact of the scope of a prohibited challenge—looking primarily to whether the landowners "seek to alter the ROD" or "change any of the requirements that the EPA has imposed upon ARCO." August 30 Slip Op. at 9.

CERCLA cleanups are often iterative in that EPA uses data obtained during the remedial investigation and early monitoring to inform subsequent adjustments to its cleanup plan. *E.g.*, CSOU ROD Am. Part II § 3.0 (describing how data obtained through sampling implemented under the original CSOU ROD led EPA to add lead remediation to its soil cleanup). Lawsuits that seek to impose different or additional remedial actions while a cleanup is in progress not only would result in diversion of limited government resources and delay of EPA's cleanup efforts contrary to Congress's intent, *McClellan*, 47 F.3d at 329, but also would force the parties to litigate the details of a cleanup plan that may not be final. Such lawsuits would also invite courts to substitute an *ad hoc* determination as to what constitutes a proper cleanup rather than deferring to EPA's technical judgment.

Not only would the landowners set a new remedial goal for soils (8 ppb for arsenic, compared to the 250 ppb ROD standard), they would achieve their goals through different methods. As in *McClellan*, the landowners' experts advocate remediation levels that are "directly related to the goals" and methods of the

cleanup of the Site prescribed by EPA. Section 113(h), however, does not allow the landowners to use their state-court lawsuit to supplement EPA's selected response-action cleanup levels.

C. Section 113(h) Bars the Landowners' Restoration-Damages Claim Irrespective of CERCLA's Savings Clauses.

The District Court relied on CERCLA's savings clauses in holding that section 113(h) did not bar the landowners' restoration-damages claim. Aug. 30 Slip Op. at 5-8. EPA agrees that CERCLA does not bar all of the landowners' common-law claims. No savings clause, however, shields the landowners' restoration-damages claim. Section 302(d) of CERCLA, which provides in part that "[n]othing 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," 42 U.S.C. § 9652(d), is not in conflict with section 113(h). As the Ninth Circuit stated in *Razore*, "[t]he temporary bar to citizen enforcement does not change [a potentially responsible party's] 'obligations or liabilities'" under other statutes. 66 F.3d at 240. Moreover, reading section 302(d) to govern the interpretation of section 113(h) "would effectively write [section 113(h)] out of the Act," a result that would be contrary to the court's "duty to give effect, if possible, to every clause and word of a statute." *Id.* (alteration in original) (citations

omitted). As the Seventh Circuit has pointed out, while "federal environmental laws [were] not intended to wipe out the common law of nuisance," section 302(d) "must not be used to gut provisions of CERCLA." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998).

Two other provisions of CERCLA, sections 114(a) and 310(h), also contain savings provisions, but neither provision trumps the limitations Congress set out in section 113(h). 42 U.S.C. §§ 9614(k), 9659(h). Section 310(h) provides that the statute "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)] of this title*." 42 U.S.C. § 9659(h) (emphasis added). The express language of this savings clause demonstrates the primacy of section 113(h). *See Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012). Section 114(a) likewise contains no language that would overcome the limitations Congress set out in section 113(h). This case presents a perfect example of how these provisions interrelate. CERCLA does not bar all of the landowners' state-law claims. Only the landowners' claim for restoration damages, to pay for response action above and beyond EPA's selected remedy, is currently barred by CERCLA (and is not saved by any of CERCLA's various savings provisions).

II. Principles of Conflict Preemption Independently Bar the Landowners' Restoration-Damages Remedy.

If there is a conflict between federal and state cleanup standards, federal law prevails where it is "a physical impossibility" to comply with both the federal and state mandates, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Where state action conflicts with a CERCLA cleanup, state cleanup standards are preempted. *See City & County of Denver*, 100 F.3d at 1512-14 (holding that a municipal ordinance imposing a fee on EPA's selected remedy conflicts with a CERCLA cleanup). Even if section 113(h) did not bar the landowners' restoration damages claim, the doctrine of conflict preemption, grounded in the Supremacy Clause, U.S. Const. art. VI, cl. 2, independently bars the landowners'' restoration-damages remedy here. *See generally Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015).

In conducting a preemption analysis, two bedrock principles guide the courts: (1) the purpose of Congress; and (2) "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Nation v. City of Glendale*, 804 F.3d

1292, 1298 (9th Cir. 2015) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Congress, in CERCLA, established how EPA should determine the degree of cleanup at a site, including how EPA should consider non-federal standards (such as state standards) in selecting the final cleanup level. *See* 42 U.S.C. § 9621(d). Congress was clear that the President or his delegates were responsible for remedy selection, after considering state-law cleanup standards and a host of other factors. *See id.* § 9621(a). Allowing the landowners' restoration-damages claim to proceed cannot be reconciled with that congressionally mandated approach for consideration of state and local requirements.

Aspects of the landowners' restoration plan also conflict with EPA's RODs or could make those remedies difficult or impossible to achieve, as discussed more fully in argument section I-B. For example, the landowners' proposed construction of a series of underground barriers could divert groundwater in several areas of concern, which are subject to ongoing groundwater-monitoring efforts under EPA's selected cleanup plan. Additionally, the same excavated soil cannot be transported to EPA-approved onsite repositories, as provided for in the CSOU ROD, and also be transported to Missoula or Spokane, as required in the

landowners' restoration plan.[8] This is the type of uncoordinated response that CERCLA section 121(d), 42 U.S.C. § 9621(d), was designed to prevent. Because Congress has spoken on this point, and clearly intended to supersede non-federal supplemental or additional remedies in the narrow instances presented in this case, conflict preemption is appropriate here.

III. Even if Plaintiffs' Claims Were Otherwise Permissible, the Relief They Seek May Be Barred Under CERCLA Section 122(e)(6).

To ensure that remedial actions are selected and conducted consistent with CERCLA's requirements, Congress declared that no "potentially responsible party," or PRP, may undertake *any* remedial action at a facility where a CERCLA remedial investigation and feasibility study (RI/FS) has been initiated, unless authorized by EPA. As Congress provided in section 122(e)(6) of CERCLA:

> 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 [EPA].

42 U.S.C. § 9622(e)(6). As outlined above, the President has initiated an RI/FS for the Anaconda Smelter Site under CERCLA, through EPA securing ARCO's

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[8] Even if the landowners deposit excavated soil in onsite repositories, that approach would unexpectedly increase soil volume and would create additional costs for EPA's cleanup.

agreement to perform the RI/FS for the various operable units within the Site. Consequently, no PRP may undertake any remedial action at the Site without EPA authorization. *See id.* § 9622(e)(6). EPA has not authorized the remedial action the landowners appear to seek in their restoration-damages claim, and therefore neither ARCO nor any landowner PRP may undertake it. Though the landowners seek money damages, those damages presuppose a subsequent remedy that is unauthorized.

CERCLA designates current owners of contaminated property as PRPs, *see* 42 U.S.C. § 9607(a)(1), unless they meet certain requirements, *see id.* § 9607(q). The District Court improperly concluded that the landowners need to be somehow "declared PRPs" to be considered a potentially responsible party. Aug. 30 Slip Op. at 15. That conclusion is incorrect, and is untethered to the statutory language. Parties that meet the requirements set out in 42 U.S.C. § 9607(a)(1) are, by definition, potentially responsible parties—regardless of whether they have defenses that could absolve them of liability. Most relevant here are the so-called "third party" and "innocent landowner" defenses, by which a PRP may show that the release of hazardous substances was caused solely by "an act or omission of a third party," *id.* § 9607(b)(3), or that "the disposal or placement of the hazardous substance" occurred before the PRP acquired the property, *id.* § 9601(35)(A).

However, those defenses are defenses to a PRP's liability for cleanup costs. Section 122(e)(6) prohibits PRPs from initiating a remedial action without EPA permission.

The term "potentially responsible" carries particular weight in this context because Congress, when drafting CERCLA, sometimes used the term "responsible party," *see e.g.*, *id.* §§ 9601(39)(D)(ii)(bb), 9604(a)(1), and sometimes used the term "potentially responsible party, *see e.g.*, *id.* §§ 9604(a)(1), 9605(h)(4). In other words, it appears that Congress did not intend to add a requirement that a landowner actually be held liable before section 112(e)(6), 42 U.S.C. § 9612(e)(6), applied. Even if a person ultimately is not liable under CERCLA, that person still may fall into the category of "potentially" liable parties.

The District Court failed to undertake the proper statutory analysis by focusing on whether the landowners were "*potentially* responsible parties." The District Court likewise failed to assess whether any of the 98 landowners qualified as a protected "third party" or "innocent landowner" under the statutory definitions. Thus, the District Court's conclusion that all 98 landowners are not subject to the requirements of CERCLA section 122(e)(6) is fatally flawed.

The United States takes no position as to the ultimate issues of fact to be considered in weighing whether any of the landowners qualify as protected third

parties or innocent landowners. If this Court agrees that section 113(h) prohibits the state restoration-damages claim as a matter of law, it need not address section 122(e)(6). EPA is unlikely to approve the cleanup proposed by the landowners because that approach is inconsistent with EPA's RODs for the reasons discussed in sections I-A, I-B, and II of this brief. Such a tentative proposal is not a proper basis for a damages award.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over, and should dismiss, the landowners' claim for restoration damages.

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NOVEMBER 15, 2016

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CERTIFICATE OF SERVICE

I certify that, on this 15th day of November 2016, a copy of the foregoing document was served by first-class mail to counsel of record for each of the parties, as set forth below.

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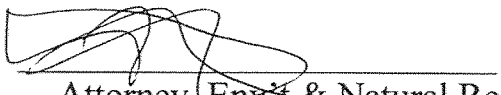

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The foregoing brief uses a monospaced Times New Roman 14 point typeface. According to the Microsoft Word text counting function, this brief contains 7,487 words. This brief exceeds the 5,000 word limit for amicus briefs set by Rule 11(4) of the Montana Rules of Appellate Procedure, and is accompanied by a Motion to File an Over-Length Amicus Brief.

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IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 16-0555

ATLANTIC RICHFIELD COMPANY
Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE HONORABLE KATHERINE M. BIDEGARAY
Respondent,

UNITED STATES' AMICUS BRIEF

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STATEMENT OF THE CASE

In an October 5, 2016, order this Court invited the United States Environmental Protection Agency (EPA) to file this *amicus* brief, addressing whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) bars or otherwise prevents a claim for restoration damages under Montana law that a group of 98 landowners has filed against the Atlantic Richfield Company (ARCO).

STATEMENT OF ISSUES

Does CERCLA bar the landowners' claim for restoration damages?

STATEMENT OF FACTS

The United States relies on ARCO's November 17, 2016 brief to set out the primary factual and procedural background. In addition, however, we note that though EPA has been actively responding to hazardous-substance contamination at the Site for more than 30 years, significant work remains. This includes cleanup of an additional 1,150 residential yards, revegetation of 7,000 acres of upland soils, and removal and closure of waste areas, stream banks, and railroad beds. Final Residential Soils Report, August 7, 2015, available at https://semspub.epa.gov/src/document/08/1549208; Fifth Five-Year Review (Sept. 25, 2015), Table 10-1 at 10-7 https://semspub.epa.gov/src/document/08/1549381.

EPA estimates that ARCO will complete this work by approximately 2025, though monitoring and maintenance work will continue indefinitely. Fifth Five-Year Review, Table 10-7 at 10-58.

Response actions at two of EPA's five Operable Units (OUs) directly impact the landowners' property: Community Soils (CSOU), which primarily addresses residential yards contaminated with arsenic and lead in Anaconda, Opportunity, and the surrounding area; and Anaconda Regional Water, Waste, and Soils (ARWWS OU), which addresses a variety of soil, surface water, and groundwater contamination issues throughout the Site. *See generally* Record of Decision, Community Soils Operable Unit, Sept. 1996, CSOU ROD; *see also* Record of Decision, ARWWS OU, Sept. 1998 (ARWWS OU ROD).[1] EPA considered construction of an underground Permeable Reactive Barrier (PRB), similar to the barrier proposed by the landowners, along Willow Creek for collecting and treating groundwater south of Opportunity to protect surface water in Willow Creek to the south and east of Opportunity. ARWWS OU ROD Am. § 6.4.2.1; ARWWS OU ROD Am. Responsiveness Summary § 3.0. EPA concluded, however, that this approach would not necessarily achieve the human health standard in Willow Creek and would not eliminate exceedances of arsenic in downstream receiving

[1] The ARWWS OU ROD is available at http://goo.gl/DWz1pF.

waters. *Id.* § 6.4.3.1 & Responsiveness Summary § 3.0. EPA also determined that it was technically impracticable to reduce arsenic concentrations below 10 ppb in shallow groundwater in the South Opportunity aquifer. *Id.* § 6.4.1. EPA therefore did not select below-ground structures to address groundwater arsenic concentrations.

STANDARD OF REVIEW

EPA adopts the Standard of Review set out in Petitioner's brief.

SUMMARY OF ARGUMENT

In CERCLA, Congress narrowly circumscribed when and how to challenge an EPA-selected remedy and provided EPA with authority to review and approve remedial actions undertaken by potentially responsible parties to ensure that contaminated sites are cleaned up efficiently and without delay. Specifically, CERCLA section 113(h) bars "any challenges" to a removal or remedial action selected under CERCLA section 104. *See* 42 U.S.C. §§ 9604, 9613. The landowners' restoration-damages claim challenges EPA's selected response actions at the Site because the landowners would require different cleanup standards and actions for soil cleanup, and require installation of underground groundwater barriers, which could undermine EPA's cleanup approaches. Section 113(h)

prohibits this claim because it would impose different response actions than those selected by EPA.

Additionally, the doctrine of conflict preemption independently bars ARCO's restoration-damages remedy. Congress delegated the President authority to set cleanup levels and select response actions. Implementing the landowners' restoration-damages remedy would undermine Congress's approach, and aspects of the landowners' proposed remedy conflict with EPA's response action. Because Congress intended to supersede these types of non-federal remedies, the doctrine of conflict preemption bars the landowners' proposed cleanup.

Even if these principles did not bar the landowners' claim, CERCLA section 122(e)(6), 42 U.S.C. § 9622(e)(6), requires EPA authorization of any remedial action at a CERCLA site by potentially responsible parties where, as here, EPA has already initiated a remedial investigation and feasibility study. The landowners own property at the Site, and the District Court did not properly assess whether the landowners are potentially responsible parties under CERCLA. It is likely that some, if not all, of the landowners are potentially responsible parties. No landowner has sought EPA approval to undertake any remedial action at the Site. EPA is unlikely to approve the landowners' approach, and no court should assume that the landowners' proposed remedy could be implemented. Thus, the

landowners' proposed remedy is not a reliable basis for an award of restoration damages.

ARGUMENT

Over the course of more than three decades, EPA has invested millions of dollars in agency resources and thousands of hours of employee time, and has required ARCO to spend hundreds of millions more characterizing the Site, developing RODs, and cleaning the Site. The remedy-selection process continues to respond to public concerns and new data. For example, EPA significantly amended the RODs in 2011 and 2013 based on new information. The remedy-selection and implementation processes account for a wide range of technical, scientific, and community concerns.

EPA's responsibility is to protect human health and the environment based on sound science. It is vital that cleanups proceed expeditiously once EPA selects a remedy. Congress was concerned that consideration of the same broad interests that make for a robust remedy-selection process should not work to prevent EPA's selected remedy from moving forward.

Congress included statutory provisions such as CERCLA's section 113(h), 42 U.S.C. § 9613(h), and section 122(e), 42 U.S.C. § 9622(e), to ensure that an EPA-selected cleanup moves forward without obstruction, delay, and the diversion of

resources accompanying judicial challenge and litigation-based additional cleanup requirements and expenses. No matter how well intentioned, any attempt to impose conflicting cleanup standards and response actions is prohibited by CERCLA.

I. Section 113(h) of CERCLA Prohibits the Landowners' Claim for Restoration Damages.

Under Montana law, restoration damages redress an injury to property, and may exceed the diminution in market value of property caused by the particular injury. *See Lampi v. Speed*, 261 P.3d 1000, 1004 ¶ 21 (Mont. 2011); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086-88 ¶¶ 28-31, 38 (Mont. 2007). To prevent a windfall, Montana requires a plaintiff asserting a claim for restoration damages to show that any award of such damages will actually be used to abate the injury. *Sunburst*, ¶ 40-43; *Lampi*, ¶ 31. The landowners' claim for restoration damages poses a prohibited challenge because it would (1) impose more stringent cleanup levels, (2) impose additional requirements, and (3) require approaches to groundwater remediation and soil disposal that directly conflict with EPA's ROD.

A. The Landowners' Restoration Damages Claim Is an Impermissible Challenge to EPA's Ongoing Cleanup of the Anaconda Smelter Site.

The section 113(h) bar applies to any claims that in their effect "challenge[] any removal or remedial action selected under section 9604 of this title" or seek

"to review any order under section 9606(a) of this title." 42 U.S.C. § 9613(h). The Ninth Circuit has found this language to be "clear and unequivocal," and "amount[ing] to a blunt withdrawal of … jurisdiction" for "any challenges" to an ongoing CERCLA response action, including any attempt to interfere with, strengthen, or control the cleanup or remedy. *McClellan Ecological Seepage Situation*, 47 F.3d 325, 328 (9th Cir. 1995) (internal citations omitted). Congress chose to prioritize expeditious cleanup of hazardous substances and to ensure that litigation would not interfere with such cleanup actions.

The District Court here held that the restoration-damages claim could proceed to trial because a claim challenges EPA's cleanup "*only* if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup." August 30 Slip Op. at 9 (emphasis added) (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000)). This holding is erroneous, mischaracterizes Ninth Circuit law, and reflects an overly narrow view of section 113(h). In the case cited by the District Court, *ARCO Environmental Remediation*, the Ninth Circuit held only that a claim regarding the right to access public information about a cleanup was not a "challenge" because that claim was not, in any way, related to the goals of the challenged cleanup. *Id.* The Ninth Circuit did not hold that termination or delay was *necessary* to trigger section

113(h). Rather, it recognized, in dicta, that termination or delay of an EPA-mandated cleanup was *sufficient* to trigger the section 113(h) bar.[2] *See* 213 F.3d at 1115.

The District Court should have dismissed the restoration-damages claim. Most courts have correctly concluded that any suit that will "impact the implementation" of the government's selected CERCLA response action constitutes a "challenge" within the meaning of section 113(h). *See Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990). While Congress did not intend to bar all state-law claims related to hazardous substances, *see New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243-44 (10th Cir. 2006) (citing cases), many courts have correctly found that Congress did intend to bar attempts to apply *any* law that even indirectly works to control, alter, or interfere with an EPA-selected remedy, or that

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[2] Section 113(h) states that "[n]o Federal court shall have jurisdiction … under State law … to review any challenges to removal or remedial action …." 42 U.S.C. § 9613(h) (emphasis added). The landowners did not argue in district court that section 113(h) is inapplicable to state courts, but state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim. CERCLA section 113(b) gives "the United States district courts" "exclusive original jurisdiction over all controversies arising under [CERCLA] …." *Id.* § 9613(b). The Ninth Circuit has explained that section 113(h) speaks in terms of actions brought in federal courts because Congress required CERCLA controversies be litigated in federal courts. *See Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999); *see also O'Neal v. Dep't of the Army*, 742 A.2d 1095, 1100-01 (Pa. Super. Ct. 1999).

otherwise affects the goal of the remedy. *See McClellan*, 47 F.3d at 330. Even claims that purport to strengthen EPA's selected remedy are barred. *Id.*; *see also United States v. City & County of Denver*, 100 F.3d 1509, 1513-14 (10th Cir. 1996) (zoning requirements barred); *Town of Acton v. W.R. Grace Co.*, No. 13–12376–DPW, 2014 WL 7721850 (D. Mass. Sep. 22, 2014) (municipal groundwater cleanup standards barred).

A "challenge" includes actions that are "related to the goals of the cleanup." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Courts have even barred claims seeking to enforce other federal laws and state laws that attempt to supplement EPA's CERCLA remedy. *See, e.g., Diamond X Ranch, LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1021 (D. Nev. 2014). The Ninth Circuit has made clear that the prohibition of section 113(h) applies equally to both federal and state actions because "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; *see also ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *McClellan*, 47 F.3d at 328; 42 U.S.C. § 9613(b).

In *McClellan,* the Ninth Circuit ruled that a suit seeking to impose additional reporting requirements would "second-guess" EPA's determination and interfere with the remedial action selected, and was accordingly barred by section 113(h).

47 F.3d at 329-30. Similarly, in *Razore*, the court held that section 113(h) barred the plaintiffs' claims regarding EPA's cleanup of a former landfill, which amounted to an "attempt to dictate specific remedial actions and to alter the method and order for cleanup." 66 F.3d at 239-40; *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220-23 (9th Cir. 2013); *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995); *ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *Villegas v. United States*, 926 F. Supp. 2d 1185, 1196 (E.D. Wash. 2013) ("CERCLA's broad jurisdictional bar applies to any suit that challenges any aspect of a CERCLA removal or remediation action, regardless of whether the suit purports to be based on CERCLA."). Other circuits have reached similar holdings. The Tenth Circuit held that a state public-nuisance and negligence suit seeking an unrestricted award of money damages was barred by section 113(h). *New Mexico*, 467 F.3d at 1249-50; *see also Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002); *Cannon v. Gates*, 538 F.3d 1328, 1335-36 (10th Cir. 2008).

The District Court incorrectly distinguished the Tenth Circuit's decision by drawing a distinction between common-law and statutory claims. Aug. 30 Slip Op. at 10. But CERCLA section 113(h) does not focus on the nature of the underlying

cause of action. Rather, it requires courts to assess the impact of the non-federal remedy (here, the restoration-damages claim) to determine if that remedy poses a prohibited "challenge." *See* 42 U.S.C. § 9613(h). *New Mexico*, along with *McClellan*, *Razore*, and the other cases cited above, shows how courts have assessed what constitutes a prohibited challenge. While many common-law claims survive, the express statutory language of CERCLA makes clear that no claim survives if it seeks to challenge or has the effect of challenging EPA's ROD.

These readings of the scope of section 113(h) are dictated by the broad language used by Congress. Congress emphatically barred "*any* challenges to removal or remedial action … in *any* action," 42 U.S.C. § 9613(h) (emphasis added); and the United States Supreme Court recognizes the comprehensive scope of the term "any." *See United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *see also United States v. James,* 478 U.S. 597, 605 (1986) ("Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction" (emphasis in original)). The sweeping nature of Congress's word choice supports a broad reading of the language of section 113(h).

Legislative history also supports a broad reading of section 113(h). The Chairman of the Senate Judiciary Committee explained:

> The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the actions that are performed by EPA. The section covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986). Such an intent to prohibit review of "all lawsuits" under "any authority," and to cover "all issues," supports the conclusion that section 113(h) bars the landowners' challenge to EPA's ROD.

Finally, actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA. *See* 42 U.S.C. § 9622; *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013). The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations.

Importantly, Congress also provided mechanisms to challenge EPA's ROD. Those mechanisms are listed in section 113(h). For example, if the landowners believe that EPA's remedy is not sufficiently protective, they may bring a citizen suit under 42 U.S.C. § 9659. *See id.* § 9613(h)(4). By barring litigation that

challenges a cleanup plan, section 113(h) ensures that EPA, state agencies, and potentially responsible parties participating in a cleanup can develop and implement an adequate and fully realized cleanup plan.

B. As a Factual and Practical Matter, Implementing the Landowners' Remedy Will Undermine EPA's Ability to Implement Its Own Remedy.

In the prior section, we address law surrounding the nature of a "challenge" under section 113(h). Here, we focus on how the landowners' claim impacts EPA's remedy at the Site. Under Montana law, the landowners must use any restoration-damages award to restore the affected properties. It follows that obtaining restoration damages under state law necessarily means implementing a cleanup action different from the one selected by EPA. The landowners' experts take issue with the cleanup standards selected by EPA, seeking to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA. The landowners' experts also proposed actions that differ from those EPA has required, including: (1) excavating to two feet rather than EPA's chosen depth of 18 inches within residential areas; (2) transporting the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA; and (3) constructing a series of underground trenches and barriers for capturing and treating shallow groundwater. The landowners' experts' reports are not detailed, but do indicate that aspects of those plans are a dramatic departure from EPA's ROD

requirements. Given the ongoing cleanup at the Site, the landowners bear the burden of showing consistency with section 113(h)—any missing details weigh in favor of dismissing the landowners' claim.

The District Court, disregarding the 1150 properties that remain to be cleaned, appeared to rely heavily on ARCO's representation that the cleanup of the landowners' residential yards will be finished by November 1, 2016, to support its conclusion that the landowners' supplemental restoration requirements will not interfere with ongoing ROD requirements. Aug. 30 Slip Op. at 8. The District Court's conclusion ignores the full impact of permitting the restoration claim to go forward. Allowing individual property owners to divert cleanup resources from the implementation of EPA's ROD is a direct conflict with EPA's cleanup process. Goals of the CSOU ROD, for example, include minimization of dust transfer, bioavailablity of lead, and soil ingestion. CSOU ROD Am. at II-11. Once the EPA remedy at the landowners' properties is complete, the completed yards are either capped or backfilled with clean soil. *See, e.g.*, CSOU ROD Am. II-18 – II-19 (setting residential-soils requirements including a "soil swap" and ensuring "replacement with clean soil and a vegetative … or other protective barrier"). Tearing up that protective cap or layer of soil directly impacts EPA's chosen remedy and could expose the neighborhood to an increased risk of dust transfer or

contaminant ingestion. Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public. Even if the landowners attempt to coordinate their efforts with EPA, their involvement would slow the implementation and timeline of EPA's ROD and increase the agency's costs. The District Court's analysis wrongly assumed that the restoration on the Site proposed by the landowners' experts could proceed without risk or consequence. *See* Aug. 30 Slip Op. at 8. Additionally, even if EPA could coordinate with the landowners, recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres.

The landowners' proposal to install underground reactive barriers is plainly inconsistent with EPA's cleanup, and may pose even greater risks. First, it is important to understand that water from domestic wells in the town of Opportunity is generally clean and drinkable, due to natural conditions in the deep underground aquifer accessed by the wells, and to hydraulic controls (a drain-tile system) that intercept arsenic contamination in shallow groundwater beneath the town of Opportunity. ARWWS ROD Am. at 6.4.1. If conditions change, EPA can take additional actions that it deems appropriate to protect human health and the environment based on what it learns through monitoring. ARWWS ROD Am. at 6.4.5.

By contrast, the landowners would build several underground permeable reactive barriers. Kane Rep., Opinion 4(b), at 10. These barriers, intended to treat shallow groundwater moving toward Opportunity, would be 8,000 feet long, 15 feet deep, three feet wide, and situated upgradient of the town. *Id.* Shorter barriers would be placed upgradient of individual landowners' properties. *Id.* These barriers could change the groundwater flow in unpredictable ways, which could impact current hydraulic controls. The barriers proposed by the landowners' experts contain elements and enzymes that supposedly strip arsenic in water but could unintentionally contaminate groundwater and surface water. *Id.* In other words, the landowners' remedy could upset a balance that currently protects human health and the environment. Additionally, if EPA sampling detects elevated contamination following landowners' installation of underwater barriers, EPA will not be able to determine whether the contamination was impacted by the landowners' project, complicating potential remedial options. If other property owners later filed similar claims and demanded construction of additional structures not envisioned by the ROD the situation becomes even more complex. Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids *ad hoc* addition of potentially competing cleanup measures. The District Court took far too narrow a view of the

impact of the scope of a prohibited challenge—looking primarily to whether the landowners "seek to alter the ROD" or "change any of the requirements that the EPA has imposed upon ARCO." August 30 Slip Op. at 9.

CERCLA cleanups are often iterative in that EPA uses data obtained during the remedial investigation and early monitoring to inform subsequent adjustments to its cleanup plan. *E.g.*, CSOU ROD Am. Part II § 3.0 (describing how data obtained through sampling implemented under the original CSOU ROD led EPA to add lead remediation to its soil cleanup). Lawsuits that seek to impose different or additional remedial actions while a cleanup is in progress not only would result in diversion of limited government resources and delay of EPA's cleanup efforts contrary to Congress's intent, *McClellan*, 47 F.3d at 329, but also would force the parties to litigate the details of a cleanup plan that may not be final.

Not only would the landowners set a new remedial goal for soils (8 ppm for arsenic, compared to the 250 ppm ROD standard), they would achieve their goals through different methods. As in *McClellan*, the landowners' experts advocate remediation levels that are "directly related to the goals" and methods of the cleanup of the Site prescribed by EPA. Section 113(h), however, does not allow the landowners to use their state-court lawsuit to supplement EPA's selected response-action cleanup levels.

C. Section 113(h) Bars the Landowners' Restoration-Damages Claim Irrespective of CERCLA's Savings Clauses.

The District Court relied on CERCLA's savings clauses in holding that section 113(h) did not bar the landowners' restoration-damages claim. Aug. 30 Slip Op. at 5-8. No savings clause, however, shields the landowners' restoration-damages claim. Section 302(d) of CERCLA, which provides in part that "[n]othing 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," 42 U.S.C. § 9652(d), is not in conflict with section 113(h). As the Ninth Circuit stated in *Razore*, "[t]he temporary bar to citizen enforcement does not change [a potentially responsible party's] 'obligations or liabilities'" under other statutes. 66 F.3d at 240. Moreover, reading section 302(d) to govern the interpretation of section 113(h) "would effectively write [section 113(h)] out of the Act," a result that would be contrary to the court's "duty to give effect, if possible, to every clause and word of a statute." *Id.* (alteration in original) (citations omitted). As the Seventh Circuit has pointed out, while "federal environmental laws [were] not intended to wipe out the common law of nuisance," section 302(d) "must not be used to gut provisions of CERCLA." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998).

Two other provisions of CERCLA, sections 114(a) and 310(h), also contain savings provisions, but neither provision trumps the limitations Congress set out in section 113(h). 42 U.S.C. §§ 9614(k), 9659(h). Section 310(h) provides that the statute "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)] of this title.*" 42 U.S.C. § 9659(h) (emphasis added). The express language of this savings clause demonstrates the primacy of section 113(h). *See Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012). Section 114(a) likewise contains no language that would overcome the limitations Congress set out in section 113(h). This case presents a perfect example of how these provisions interrelate. CERCLA does not bar all of the landowners' state-law claims – only the landowners' claim for restoration damages.

II. Principles of Conflict Preemption Independently Bar the Landowners' Restoration-Damages Remedy.

If there is a conflict between federal and state cleanup standards, federal law prevails where it is "a physical impossibility" to comply with both the federal and state mandates, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*,

312 U.S. 52, 67 (1941). Where state action conflicts with a CERCLA cleanup, state cleanup standards are preempted. *See City & County of Denver*, 100 F.3d at 1512-14. Even if section 113(h) did not bar the landowners' restoration damages claim, the doctrine of conflict preemption, grounded in the Supremacy Clause, U.S. Const. art. VI, cl. 2, independently bars the landowners'' restoration-damages remedy here. *See generally Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015).

In conducting a preemption analysis, two bedrock principles guide the courts: (1) the purpose of Congress; and (2) "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Nation v. City of Glendale*, 804 F.3d 1292, 1298 (9th Cir. 2015) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Congress, in CERCLA, established how EPA should determine the degree of cleanup at a site, including how EPA should consider non-federal standards (such as state standards) in selecting the final cleanup level. *See* 42 U.S.C. § 9621(d). Congress was clear that the President or his delegates were responsible for remedy selection, after considering state-law cleanup standards and a host of other factors. *See id.* § 9621(a). Allowing the landowners' restoration-damages claim to proceed

cannot be reconciled with that congressionally mandated approach for consideration of state and local requirements.

Aspects of the landowners' restoration plan also conflict with EPA's RODs or could make those remedies difficult or impossible to achieve, as discussed more fully in argument section I-B. For example, the landowners' proposed construction of a series of underground barriers could divert groundwater in several areas of concern, which are subject to ongoing groundwater-monitoring efforts under EPA's selected cleanup plan. Additionally, the same excavated soil cannot be transported to EPA-approved onsite repositories, as provided for in the CSOU ROD, and also be transported to Missoula or Spokane, as required in the landowners' restoration plan.[3] This is the type of uncoordinated response that CERCLA section 121(d), 42 U.S.C. § 9621(d), was designed to prevent.

III. Even if Plaintiffs' Claims Were Otherwise Permissible, the Relief They Seek May Be Barred Under CERCLA Section 122(e)(6).

As Congress provided in section 122(e)(6) of CERCLA:

> When either the President, or a potentially responsible party … 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 [EPA].

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[3] Even if the landowners deposit excavated soil onsite, that approach would create additional costs for EPA's cleanup.

42 U.S.C. § 9622(e)(6). The President has initiated a remedial investigation and feasibility study (RI/FS) for the Anaconda Smelter Site under CERCLA, through EPA securing ARCO's agreement to perform the RI/FS for the various operable units within the Site. Consequently, no PRP may undertake any remedial action at the Site without EPA authorization. *See id.* § 9622(e)(6). EPA has not authorized the remedial action the landowners appear to seek in their restoration-damages claim, and therefore neither ARCO nor any landowner PRP may undertake it. Though the landowners seek money damages, those damages presuppose a subsequent remedy that is unauthorized. EPA is unlikely to approve the cleanup proposed by the landowners because that approach is inconsistent with EPA's RODs for the reasons discussed in sections I-A, I-B, and II of this brief. Such a tentative proposal is not a proper basis for a damages award.

CERCLA designates current owners of contaminated property as PRPs, *see* 42 U.S.C. § 9607(a)(1), unless they meet certain requirements, *see id.* § 9607(q). The District Court improperly concluded that the landowners need to be somehow "declared PRPs" to be considered a potentially responsible party. Aug. 30 Slip Op. at 15. That conclusion is incorrect, and is untethered to the statutory language. Parties that meet the requirements set out in 42 U.S.C. § 9607(a)(1) are, by definition, potentially responsible parties—regardless of whether they have

defenses that could absolve them of liability. Most relevant here are the so-called "third party" and "innocent landowner" defenses, by which a PRP may show that the release of hazardous substances was caused solely by "an act or omission of a third party," *id.* § 9607(b)(3), or that "the disposal or placement of the hazardous substance" occurred before the PRP acquired the property, *id.* § 9601(35)(A). However, those defenses are defenses to a PRP's liability for cleanup costs. Section 122(e)(6) prohibits PRPs from initiating a remedial action without EPA permission.

The District Court failed to undertake the proper statutory analysis by focusing on whether the landowners were "*potentially* responsible parties." The District Court likewise failed to assess whether any of the 98 landowners qualified as a protected "third party" or "innocent landowner" under the statutory definitions. Thus, the District Court's conclusion that all 98 landowners are not subject to the requirements of CERCLA section 122(e)(6) is fatally flawed.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over, and should dismiss, the landowners' claim for restoration damages.

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DECEMBER 8, 2016

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CERTIFICATE OF SERVICE

I certify that, on this 8th day of December 2016, a copy of the foregoing document was served by first-class mail to counsel of record for each of the parties, as set forth below.

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CERTIFICATE OF COMPLIANCE

The foregoing brief uses a monospaced Times New Roman 14 point typeface. According to the Microsoft Word text counting function, this brief contains 4,999 words. This brief complies with the 5,000 word limit for amicus briefs set by Rule 11(4) of the Montana Rules of Appellate Procedure.

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Message

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Subject: Re: New Tech for Cleaning up the Berkeley Pit

Mr. Thompson,

We look forward to working with you to advance the best solution for the Butte community and state of Montana. The Metals US team, and other friends and partners of ours, have invested significant time and interest in understanding the Berkeley Pit situation, chemistry, and possible solutions because we are concerned about the ongoing and possibly escalating impact of the site. We believe our technology could be the missing link that could enable a best possible outcome for everyone, and we feel it is our responsibility as citizens to do what we can to help out. On that basis, we have put together a preliminary plan that I think is feasible, and we would like to engage in a straightforward process to see if it is the right answer. Since every application and solution is different, any advance projections of costs and values is an approximation, no matter how established or well used a technology may be. No doubt you have had to refine your process and therefore costs and economics for the current precipitation process over the course of your ongoing development work.

We work with a number of Fortune 500 companies to provide solutions to problems otherwise difficult to address with conventional technologies. Initial modeling may be done with established rubrics to see if the costs are within the range of feasibility. We have done this with the Berkeley Pit with our internal costing models, and the results are reflected in the document provided. However, since providing very detailed modeling and costing for complicated projects like the Berkeley Pit can take many months of time cost up to hundreds of thousands of dollars in engineering cost and assessment, serious clients generally prefer to first establish that the technology can in fact meet water treatment goals, at least at smaller scale, through basic test work. This provides direct results with the target solution which not only proves technical feasibility, but also provides a framework for more accurate projections. We have always found our clients to be quite willing to provide us solutions for testing, and support our efforts to demonstrate the efficacy of our technology to provide them more options for solving their problem. That is a win/win for everyone.

Our ability to provide real demonstration of not only the effectiveness of the technology, but use those results to justify compelling economics, sets us apart from nearly all of our competition, and I imagine most of the technology providers you have spoken to. We have not contacted any potential purchasers of the zinc metal product. It seems a bit premature to do so, given that we do not yet have zinc production at the Pit, nor do we have a request to build a facility, nor do we even yet, it seems, have a willingness from you to provide small water samples. However, given the fact that zinc is one of the most traded and sought after commodities in the modern metals market, I do not expect surprises as regards either salability or price.

I know that Montana Resources, and other collaborating parties, have worked tirelessly to provide the Best Available Technology solution or the Berkeley Pit, and other environmental impact issues in the area. We are concerned, as I know you are, that any water discharged from the Pit meet or beat all regulatory standards, and, if possible, the water level on the Pit be drawn down so that it does not provide an ongoing threat of seepage into the surrounding water, soil, and air. I think these goals are very obtainable! We appreciate your team's deep pool of knowledge and experience with treating the Pit, and look forward to engaging you in a process that is

clear, straightforward, and transparent to determine if Solid Phase Extraction may be the BAT for at least some aspects of the water processing and solids management.

You mentioned that you and the MBMG have developed protocols for evaluating new proposals and emerging technologies. Could you provide me this written documentation, so that I can better understand your process? Also, if Mr Duaime could provide the most recent analyses from the Pit, that would be most helpful. Thank you for your assistance! Also, our team would look forward to meeting in the near future with your team to further discuss our collaboration. Best Regards,

-John

On Thu, Apr 12, 2018 at 4:14 PM, Mark Thompson <MThompson@montanaresources.com> wrote:

> Mr. Hammen,
>
> As you would expect, we receive numerous proposals to "mine" and/or treat the Berkeley Pit water. With the assistance of the Montana Bureau of Mines and Geology (MBMG), we have developed protocols to evaluate new proposals and emerging technologies. Please contact Mr. Ted Duaime at the MBMG and request the latest sampling results from the B. Pit to ensure that you are working with the most recent water quality information. Then with more detail than the proposal provide to Mr. Greene, explain your recovery and treatment train using the latest WQ results and provide detailed cost analysis. If you propose to offset treatment costs with recovered metal value, please describe in detail the form that the metal is recovered (e.g. elemental Zn, ZnS, ZnO, etc.) and a description of where and how it is marketable. Ultimately we will need written commitment from purchasers of the metals to ensure that the produced products are in fact marketable. Your proposal states that your technology has previously been demonstrated to treat B. Pit water. Could you provide this information? You also state that your technology is in production at other locations. Could you provide references?
>
> The appropriate stakeholders will review these detailed proposals and other information. Assuming that the detailed proposals demonstrate technical merit, we will require that the technology be tested off site at bench scale. Under certain conditions, Mr. Duaime can provide the water for testing. If bench testing is successful, we may allow pilot testing on site at your expense.
>
> Thank you for your interest.
>
> Mark
>
> **Mark Thompson**
>
> **Vice President of Environmental Affairs**

Montana Resources, LLP

600 Shields Ave.

Butte, Montana 59701

Phone:

Cell: Personal Matters / Ex. 6

Montana Resources

From: Greene, Nikia [mailto:Greene.Nikia@epa.gov]
Sent: Thursday, April 12, 2018 10:08 AM
To: Mark Thompson; Tim Hilmo - BP (Tim.Hilmo@bp.com)
Cc: Dreed@mt.gov; Chapin Storrar
Subject: FW: New Tech for Cleaning up the Berkeley Pit

Mark and Tim,

Mr. Hammen caught me after the ROCC/CTEC meeting yesterday and I explained that if MR and AR were interested EPA is interested. So, could you take a look at this and let me know if you are interested in pursuing this technology further or why you would not be.

Thanks,

Nikia Greene

Remedial Project Manager

U.S. EPA, Region 8

(406)-457-5019

greene.nikia@epa.gov

From: John Hammen [mailto:john.hammen@metalsus.com]
Sent: Wednesday, April 11, 2018 7:26 PM
To: Greene, Nikia <Greene.Nikia@epa.gov>
Subject: New Tech for Cleaning up the Berkeley Pit

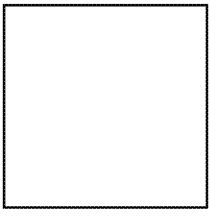
Dear Nikia:

It was a pleasure to touch bases with you today at the forum about our new technology for remediation of the Pit and surrounding areas. Let me say I admire the balance, compassion, and fortitude you bring to managing this very challenging project, while at the same time working with and bringing along the understandably frustrated Butte community. We have developed the core basis for our Solid Phase Extraction Technology (SPE) - the key part of our remediation strategy, over a few decades, and spent the last several years bringing it to commercialization. Our long vision has been to develop a technology foundation that enables us to help with projects that really have large impact on people and communities. While we have many projects with good profit margins, we have always been particularly interested in the Berkeley Pit because of its significance to Montana and the whole nation. I also believe our experience not only in technology development, but also process testing and implementation, enables us to put together a "whole package" from the science fundamentals to the facility, operations, and big picture impact that most technology imagineers lack. Our Total Metal Recovery/Zero Discharge methodology was developed because it both provides the most economic way to operate the plant, and also is the only way to provide a clean water output without large waste byproducts. I have attached our white paper on the Berkeley Pit, and I hope you find this embodied in the document. It is our hope that we can work with you and others in the EPA, the Butte community, and other related parties, to provide a solution that realizes the best possible environmental and human impact outcome, while also being economically viable and sustainable in the long run. I appreciate any thoughts you may have, and look forward to working together as things advance. With Best Regards,

-John

--

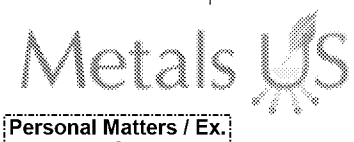
John Hammen | Chief Executive Officer



Personal Matters / Ex. 6

www.metalsus.com

--
John Hammen | Chief Executive Officer



Personal Matters / Ex. 6

www.metalsus.com

Message

From: Zumwalt, Bryan [Bryan_Zumwalt@americanchemistry.com]
Sent: 2/20/2018 4:27:05 PM
To: Jackson, Ryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=38bc8e18791a47d88a279db2fec8bd60-Jackson, Ry]; Willis, Sharnett [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=97b55bdfac5e41d8aa81064dfa2cb944-Willis, Sharnett]
CC: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: RE:

Thank you! Sharnett, literally any time on the 27th or 28th that is good for Ryan and Kell will work for our company. Thank you, Bryan

---

From: Jackson, Ryan [mailto:jackson.ryan@epa.gov]
Sent: Tuesday, February 20, 2018 10:10 AM
To: Willis, Sharnett; Zumwalt, Bryan
Cc: Kelly, Albert
Subject:

Sharnette, can you help Kell and me find a time to meet with Bryan on either the 27 or 28?

Ryan Jackson
Chief of Staff
U.S. Environmental Protection Agency
Personal Matters / Ex.

Message

From: Bridgeford, Tawny [TBridgeford@nma.org]
Sent: 9/11/2017 5:16:12 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: Invitation to Speak at the National Mining Association's Environment Committee Meeting (Oct. 16-17, 2017)
Attachments: Mr. Kelly Invite.pdf

Mr. Kelly:

Please find attached an invitation to speak at the National Mining Association's upcoming Environment Committee meeting on Oct. 16 or 17, 2017, in Washington, D.C. Details regarding the meeting are in the attached letter. We look forward to hearing from you or your staff!

Regards,

Tawny

Tawny Bridgeford
Deputy General Counsel & Vice President, Regulatory Affairs
National Mining Association
101 Constitution Ave. NW, Suite 500 East
Washington, D.C. 20001
Phone:
Direct: Personal Matters / Ex. 6
tbridgeford@nma.org

Tawny Bridgeford
Deputy General Counsel & Vice President, Regulatory Affairs

September 11, 2017

Via E-mail

Mr. Albert "Kell" Kelly
Senior Advisor to the Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

Dear Mr. Kelly:

On behalf of the National Mining Association (NMA), I would like to invite you to address a broad section of the mining industry at our upcoming meeting of NMA's Environment Committee. NMA represents the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and other firms serving the mining industry. NMA's Environment Committee consists of those environmental professionals whose job it is to understand and guide compliance with the many federal, state and local environmental regulations governing mining activities. The meeting is an informal setting that gives our industry representatives a chance to meet with key agency staff that work on their priority issues.

Notably, NMA has a subcommittee of member companies devoted to solid waste issues, including policies, regulations, and guidance related to Superfund cleanups. Our members are very interested in learning more about Administrator Pruitt's priorities for the Superfund program, as well as your work this summer in leading the Superfund Task Force in developing recommendations on opportunities to accelerate cleanup and reuse of Superfund cleanups.

The meeting will be held on Oct. 16 and 17, 2017, at the Renaissance Washington, D.C. Downtown Hotel located at 999 Ninth Street, N.W., Washington, DC. We would welcome an opportunity for you to meet with our members for 60 minutes during either day. We currently have open speaker slots as follows:

Monday, Oct. 16:

1:30 p.m. – 2:30 p.m.

3:45 p.m. – 4:45 p.m.

Tuesday, Oct. 17:

8:00 a.m. – 9:00 a.m.

10:45 a.m. – 11:45 a.m.

11:45 a.m. – 12:45 p.m.

We welcome hearing from you or your staff. Thank you for your prompt consideration of this outreach opportunity.

Regards,

Tawny A. Bridgeford

Message

From: Genovese, Robert (BP) [Robert.Genovese@bp.com]
Sent: 8/11/2017 8:54:08 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
CC: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]; Miner, Robert [Robert.Miner@bp.com]
Subject: East Chicago groundwater - USS Lead site

Kell,

I'm glad that we had the opportunity to discuss Montana Superfund sites earlier this week. I'm hopeful that, after many years of sustained effort and the commitment of substantial resources, Atlantic Richfield will be able to progress these Superfund sites to remedy completion with an appropriate legal release and EPA will be able to remove the sites from the NPL.

At the end of our meeting, we briefly discussed the USS Lead site in East Chicago. You asked me about AR's perspective on how to manage groundwater risk at this site. I'd like to share a few thoughts.

Environmental risks have three elements:

1. Harmful levels of contaminants
2. Pathway for transmission
3. Presence of biological receptors (people and wildlife)

Eliminating any one of these elements eliminates the risk.

You indicated that groundwater testing needs to be conducted in the East Chicago community. I don't know the condition of the groundwater. However, if groundwater has been impacted, then cleanup may be impractical given the extensive use of non-native fill material and one hundred years of heavy industrial activity throughout the area. Removing people also seems impractical given the large number of people currently living in the community. Furthermore, the presence of people in the community is not an issue if there is no exposure pathway for contaminants in groundwater to reach people. Communities in East Chicago use municipal water from Lake Michigan. Groundwater is not used for drinking or agriculture in East Chicago.

Eliminating exposure pathways has been a demonstrated method to manage environmental risks. This can be accomplished through an Institutional Controls (IC) program. The EPA and ITRC have published studies about the effectiveness of IC programs that are properly designed and implemented. Atlantic Richfield has utilized IC programs in communities to protect people from exposure to contaminants in groundwater. These programs can operate at the local, county or state level.

You mentioned a potential exposure pathway through basement sumps. Typically, a sump that collects water intermittently is handling recent rainwater and does not mobilize contaminants. If sumps are collecting groundwater continuously and pose a risk to exposure, then sampling the sump water would provide information to assess if there is a basis for concern. I believe that DuPont has conducted some evaluation of basement sumps in Zone 3 related to their RCRA corrective action activities. I do not have the details.

Let me know if you would like to discuss further. I would be happy to provide experienced people from Atlantic Richfield who could offer input to the EPA as the agency considers next steps to address concerns in the East Chicago community.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone Personal Matters / Ex.

Message

From: Miner, Robert [Robert.Miner@bp.com]
Sent: 7/27/2017 3:03:38 AM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: potential dates for Atlantic Richfield to come to DC

Thanks again for speaking with me today.

Bob Genovese, the president of Atlantic Richfield and the head of our environmental liability management function, is available from July 31 through August 16. I will make myself available any time during that period.

Please let us know what might work for you and your team.

Robert Miner
Senior Director
Communications & External Affairs
BP America
Robert.Miner@bp.com
Personal Matters / (cell)

Message

From: Miller, Sophie (Daines) [Sophie_Miller@daines.senate.gov]
Sent: 8/10/2017 2:18:09 PM
To: Miner, Robert [Robert.Miner@bp.com]; Marino Thacker, Meghan (Daines) [Meghan_Thacker@daines.senate.gov]
CC: Genovese, Robert (BP) [Robert.Genovese@bp.com]; Walker, Ryan [RYAN.WALKER@bp.com]; Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]; Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: RE: Black Eagle/Great Falls stakeholders

Bob,

Likewise, thank you for your time and insights yesterday, as well as for this follow-up information.

We look forward to working together.

-Sophie

From: Miner, Robert [mailto:Robert.Miner@bp.com]
Sent: Thursday, August 10, 2017 8:51 AM
To: Marino Thacker, Meghan (Daines) <Meghan_Thacker@daines.senate.gov>; Miller, Sophie (Daines) <Sophie_Miller@daines.senate.gov>
Cc: Genovese, Robert (BP) <Robert.Genovese@bp.com>; Walker, Ryan <RYAN.WALKER@bp.com>; Falvo, Nicholas <falvo.nicholas@epa.gov>; Kelly, Albert (kelly.albert@epa.gov) <kelly.albert@epa.gov>
Subject: Black Eagle/Great Falls stakeholders

Meghan and Sophie:

Thanks again for taking the time to meet with us yesterday. We are excited about the opportunity to work with your office and EPA to make meaningful progress at these sites in accordance with Administrator Pruitt's reform agenda and look forward to further discussions on how we can work together to advance these issues for the benefit of the people of Montana.

Here are key stakeholders for the Black Eagle Superfund site, as promised. I am working on getting the TAG community report for you and will forward separately.

Jay Russell, Executive Director, Lewis & Clark Foundation Personal
Perso jrussell@lewisandclarkfoundation.org
He manages the foundation that supports the Lewis & Clark Visitors Center and is an advocate for maintaining natural view shed of the area (including our property) to enhance the experience of visitors to the center.

Rivers Edge Trail Foundation Board President John Juris and VP Bruce Bollington
This board manages the bike and hike trail along the Missouri River. One of their objectives to complete the trail system which runs up and down the river with the exception of our property and a small parcel owned by the Lewis & Clark Foundation.

Black Eagle Technical Assistance Grant Administrator Sarah Peck Personal Matters / Ex. 6 sarahahp@earthlink.net and TAG Chairman Monte Marzella Personal Matters /
Black Eagle residents, they manage the TAG group whose consultant performed the community survey that identified conservation and recreation uses as the primary end use for the Anaconda site there.

Cascade County Commissioner Joe Briggs Personal Matters / briggs@co.cascade.mt.us
The site is in unincorporated Cascade County. In our conversations with him, he is interested in recreation and conservation opportunities for the site.

Montana State Parks Giants Springs Park Manager Jason Pignanelli
He manages this great state park across from the site that draws visitors to the area. Our site could well complement this park.

Robert Miner
Senior Director
Communications & External Affairs
BP America
Robert.Miner@bp.com
Personal Matters / cell)

Message

From: Miner, Robert [Robert.Miner@bp.com]
Sent: 7/26/2017 3:00:17 PM
To: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]
CC: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: Re: Could we have a quick conversation?

Perfect

Sent from my iPhone

On Jul 26, 2017, at 9:54 AM, Falvo, Nicholas <falvo.nicholas@epa.gov> wrote:

> Mr. Miner:
> Would 4:30 Eastern/3:30 Central work for you?
>
> Kell can be reached at his office Personal Matters / Ex.

From: Kelly, Albert
Sent: Wednesday, July 26, 2017 10:47 AM
To: Miner, Robert <Robert.Miner@bp.com>
Cc: Falvo, Nicholas <falvo.nicholas@epa.gov>
Subject: RE: Could we have a quick conversation?

Nick can get with you on this. After 330 is possible. We will see what Nick can come up with

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Personal Matters

From: Miner, Robert [mailto:Robert.Miner@bp.com]
Sent: Tuesday, July 25, 2017 3:20 PM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: RE: Could we have a quick conversation?

Tomorrow would be better for me. I am available until 11 central and after 330 central.

Robert Miner
Senior Director
Communications & External Affairs
BP America
Robert.Miner@bp.com
Personal Matters / (cell)

From: Kelly, Albert [mailto:kelly.albert@epa.gov]
Sent: Tuesday, July 25, 2017 2:16 PM

To: Miner, Robert; Lyons, Troy
Subject: RE: Could we have a quick conversation?

I have some time at 7 eastern or I have some time tomorrow

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Personal Matters /

From: Miner, Robert [mailto:Robert.Miner@bp.com]
Sent: Tuesday, July 25, 2017 11:14 AM
To: Kelly, Albert <kelly.albert@epa.gov>; Lyons, Troy <lyons.troy@epa.gov>
Subject: RE: Could we have a quick conversation?

Thank you.

Is there a time today that would work best for you?

Robert Miner
Senior Director
Communications & External Affairs
BP America
Robert.Miner@bp.com
Personal Matters / (cell)

From: Kelly, Albert [mailto:kelly.albert@epa.gov]
Sent: Tuesday, July 25, 2017 9:21 AM
To: Lyons, Troy; Miner, Robert
Subject: RE: Could we have a quick conversation?

Available and interested

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Personal Matters /

From: Lyons, Troy
Sent: Tuesday, July 25, 2017 10:12 AM
To: Miner, Robert <Robert.Miner@bp.com>
Cc: Kelly, Albert <kelly.albert@epa.gov>
Subject: RE: Could we have a quick conversation?

Apologies—I forgot to copy Kell

From: Lyons, Troy
Sent: Tuesday, July 25, 2017 10:02 AM
To: 'Miner, Robert' <Robert.Miner@bp.com>
Subject: RE: Could we have a quick conversation?

Bob, given my previous work experience at BP, I cannot have that conversation; however, I can connect you with Kell Kelly. Kell is the Administrator's Senior Advisor on Super Fund and is leading the Super Fund Task Force.

From: Miner, Robert [mailto:Robert.Miner@bp.com]
Sent: Tuesday, July 25, 2017 8:46 AM
To: Lyons, Troy <lyons.troy@epa.gov>
Subject: Could we have a quick conversation?

Troy:
When I was in DC, Ryan Walker and I had conversations with Congressman Amodei and Senator Daines about our Superfund sites in Nevada and Montana. I wondered if you would have a few minutes for me to share the substance of those conversations and talk about opportunities to advance those projects.

Robert Miner
Senior Director
Communications & External Affairs
BP America
Robert.Miner@bp.com
Personal Matters / (cell)

Message

From: Jackson, Ryan [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=38BC8E18791A47D88A279DB2FEC8BD60-JACKSON, RY]
Sent: 2/20/2018 3:09:59 PM
To: Willis, Sharnett [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=97b55bdfac5e41d8aa81064dfa2cb944-Willis, Sharnett]; bryan_zumwalt@americanchemistry.com
CC: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]

Sharnette, can you help Kell and me find a time to meet with Bryan on either the 27 or 28?

Ryan Jackson
Chief of Staff
U.S. Environmental Protection Agency
Personal Matters / Ex.

Message

From: Wagner, Kenneth [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=048236AB99BC4D5EA16C139B1B67719C-WAGNER, KEN]
Sent: 7/25/2017 10:14:35 PM
To: Miner, Robert [Robert.Miner@bp.com]; Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: Re: Pleasure to meet you

Robert:

Likewise, it was great to visit with you and Chris. I am glad your meetings with Alexis are proving fruitful. I find her to be incredibly capable and very straightforward. For future follow-up, I am including my colleague, Kell Kelly on this correspondence. He, as you probably know, chaired the 30-day Superfund Task Force and is a Senior Advisor to the Administrator with NPL in his portfolio among other things...

I am happy to assist also.

Ken

Kenneth E. Wagner
Senior Advisor to the Administrator
For Regional & State Affairs
US Environmental Protection Agency
Office: 202-564-1988
Cell: Ex. 6
wagner.kenneth@epa.gov

On Jul 25, 2017, at 7:53 AM, Miner, Robert <Robert.Miner@bp.com> wrote:

> Mr. Wagner:
>
> It was a pleasure to meet you at the ECOS conference in Washington last week. BP and our affiliated company Atlantic Richfield Company are excited about the EPA reform agenda and are happy to support Administrator Pruitt's desire for an expedited Superfund process.
>
> You and I spoke about the progress we have been making with Acting Regional Administrator Alexis Strauss in Region 9 on seeking a Superfund deferral agreement for the Anaconda mine site in northern Nevada. We also have been working together to introduce Lean principles to another former mine site called Leviathan. In fact, Alexis and I met the next day last week to talk about keeping that process on track.
>
> Atlantic Richfield also has legacy Anaconda sites in Montana – Butte, Anaconda and Great Falls. I would welcome the opportunity to speak with you some time about the status of those sites if you would have the time.
>
> Thanks again for taking the time to speak with my colleague Chris Greco and me at the conference and I look forward to speaking again in the future.
>
> Robert Miner
> Senior Director

Communications & External Affairs
BP America
Robert.Miner@bp.com
Ex. 6 (cell)

Message

From: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Sent: 11/21/2017 3:16:10 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: EPA policy regarding TCE remediation
Attachments: ACC letter re TCE remediation policy.pdf; OLEM Response.pdf; ACC follow-up letter on TCE.pdf; EPA to test for toxic vapors in some homes.pdf

Kell –

I have attached a short description of the issue we discussed related to remediation of trichloroethylene (TCE) contamination. Per your request, I have also included prior correspondence on the issue.

As indicated, we would like to set up a meeting to review this issue with you.

Happy Thanksgiving.

Steve

Stephen P. Risotto
srisotto@americanchemistry.com
Ex. 6 (voice)
(mobile)

June 28, 2017

Mr. Patrick Davis
Deputy Assistant Administrator
Office of Land and Emergency Management
Mail Code 5101T
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: OLEM Policy Concerning Short-Term Exposure to Trichloroethylene in Indoor Air

Dear Mr. Davis:

Thank you again for meeting with us to discuss our concerns with EPA's approach to addressing indoor air exposure to trichloroethylene (TCE) from vapor intrusion at contamination sites. As we indicated, the policy is defined in the enclosed 2014 memo from the Office of Superfund Remediation and Technology Innovation (OSRTI) which interpreted scientific data on non-cancer (*i.e.*, developmental) effects to establish a national policy for accelerated response at remediation sites. The results on which the policy relies have not been reproduced in better conducted studies. We are aware of no Agency precedent, moreover, for OSTRI's application of a chronic inhalation reference concentration to short-term exposure.

Implementation of the 2014 policy memo has resulted in a significant increase in remediation costs and caused confusion among state and regional officials and the general public. Implementation of the policy has been inconsistent among EPA Regions, moreover, and at least one state (Indiana) has taken the position that the OSTRI policy is "not scientifically supportable."

As we discussed, the ongoing risk evaluation for TCE by EPA's Office of Chemical Safety and Pollution Prevention (OCSPP) under the Lautenberg Chemical Safety Act provides an opportunity for your office to review and, as appropriate, update its policy on TCE remediation. This evaluation will be enhanced by the availability of data from new research that the industry expects to complete by the end of this year.

Consequently, we respectfully request that OLEM suspend the implementation of the 2014 OSTRI memo, and related memos issued by EPA Regional Offices, [1] until OCSPP's risk evaluation of TCE is complete. Until that time, OLEM can enforce the existing remediation values for TCE based on chronic risk exposures (of non-developmental risk endpoints) to ensure public health protection. Once the risk evaluation of TCE is complete, your office can assess the impact of its conclusions on OSTRI policy.

[1] ACC is aware of memos issued by Region 7 on November 2, 2016, by Region 9 on June 30, 2014 and July 9, 2014, and by Region 10 on December 13, 2012.

Thank you again for considering our request. Please feel free to contact me at Ex. 6 or at srisotto@americanchemistry.com if you have questions or if you would like to discuss our request further.

Sincerely,

Steve Risotto

Stephen P. Risotto
Senior Director

Enclosure

American Chemistry Council

November 21, 2017

Mr. Albert Kelly
Special Advisor
Office of the Administrator
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Office of Land and Emergency Management policy concerning short-term exposure to trichloroethylene (TCE) in indoor air

Dear Mr. Kelly:

The American Chemistry Council (ACC) represents a number of companies involved in remediation of sites contaminated with trichloroethylene (TCE). These clean-up activities have been complicated by an Agency policy outlined in memos developed by EPA Regions 7, 9, and 10 and the Office of Land and Emergency Management (OLEM) that, despite establishing precedent in the application of Agency estimates of chemical hazard, has not been subject to public notice and comment. As outlined in correspondence to the Agency by ACC and others, moreover, there are numerous concerns with the data underlying EPA's estimate of TCE hazard that create considerable uncertainty that is not reflected in the Agency's policy.

I have enclosed a recent request that ACC sent to OLEM to reconsider its TCE policy and the OLEM response to our request. Although it is difficult to estimate, we are aware of numerous incidences where the TCE policy has resulted in additional time, expense, and public awareness that are not commensurate with the public health concern. I have enclosed a recent report of a Brownfields redevelopment project demonstrating the practical impacts of the Agency's policy on TCE. We estimate that the cost of sampling alone at the Michigan site will cost $300,000 to $600,000.

We would like to meet with you to discuss the TCE policy and its impact on remediation under federal, state, and local requirements. I will contact your office to set up a meeting.

Sincerely

Steve

Stephen P. Risotto
Senior Director
Chemical Products and Technology Division

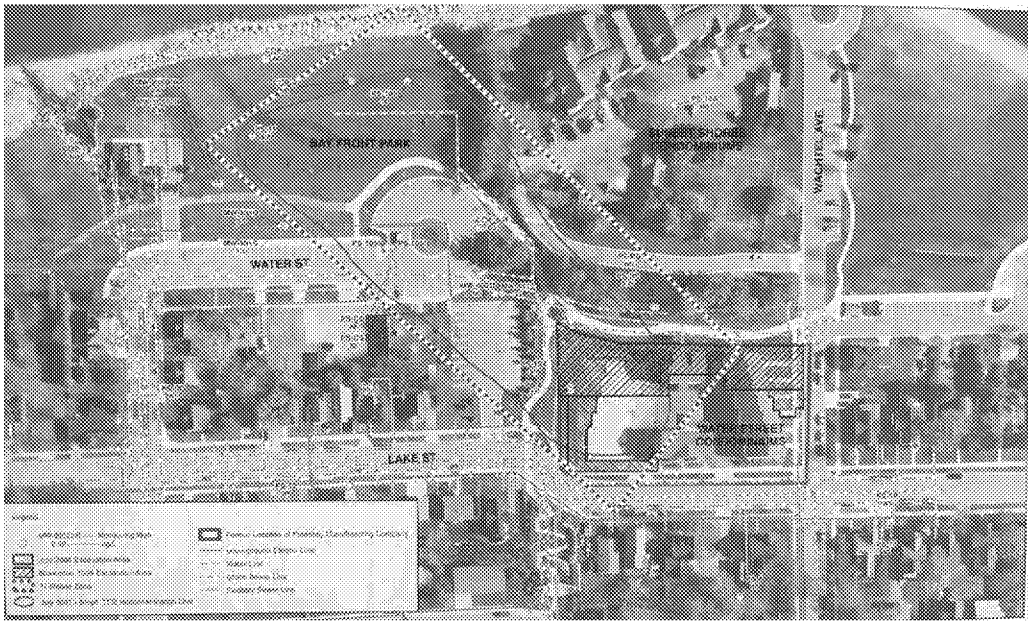
Enclosures

https://www.petoskeynews.com/featured-pnr/epa-to-test-for-toxic-vapors-in-some-homes/article_c66e31bf-8e55-5352-9686-a2d5531ce8ba.html

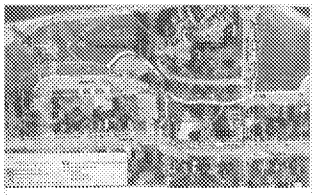
PETOSKEY

EPA to test for toxic vapors in some homes

Steve Zucker (231) 439-9346 - szucker@petoskeynews.com May 9, 2017



Courtesy image/EPAThis map shows the area in Petoskey in which EPA officials want to test homes for possible harmful chemical vapors coming from underground contamination.



Quick Read: EPA to test for toxic vapors in some homes

PETOSKEY — Officials with the U.S. Environmental Protection Agency will soon be contacting residents in a Petoskey neighborhood near an underground chemical contamination site to check their homes for the presence of possible hazardous vapors.

Officials from the EPA, working together with representatives from the Michigan Department of Environmental Quality and the Health Department of

Northwest Michigan, hosted two public information session Monday at the Petoskey City Hall to provide information on the effort.

Agency officials are hoping to gain access to homes in the area of the former Petoskey Manufacturing Co. site. The former manufacturing facility was located on the corner of West Lake Street and Wachtel Avenue, where condominiums now stand.

The agency will be conducting sub-slab and indoor air testing to try to determine if potentially harmful gasses may be moving up through the soil and into properties through cracks or holes in basements and crawl spaces and then into living areas. This type of environmental issue is called “vapor intrusion.”

The gas of concern is called trichloroethylene, or TCE, which agency officials said contaminated groundwater in the area from operations at the form Petoskey Manufacturing Company.

According to an EPA fact sheet on the site, the source of the contamination, at 200 W. Lake St., was the former Petoskey Manufacturing Co. It was a small fabricating operation that made small trim parts for the automotive industry. In addition to the plating and casting operations, the plant began painting operations in the late 1960s. Manufacturing operations were conducted on the site from 1946 to 2000, and the facility was demolished in 2004.

EPA officials said the company improperly disposed of solvents and paint sludge on the ground surface outside the company’s building. This resulted in contaminated soil and groundwater near the site and near one of the city’s municipal water wells. Contamination at the site was first discovered in September 1981 when drinking water samples from the Ingalls municipal well showed high levels of volatile organic compounds (contaminants that evaporate into the air), including xylene, toluene,

TCE, and ethyl benzene. The well ceased operations in 1997, and several types of cleanup efforts have taken place at the site.

EPA officials noted that Superfund sites such as the Petoskey Manufacturing site are reviewed every five years and in a 2014 review, vapor intrusion was identified as a potential issue at the former PMC source area.

"The science of the health effects of TCE has evolved in the 15 years since the original source area cleanup was completed. EPA's screening criteria for determining whether vapor intrusion might be a health concern are now much lower and conservative. That means concentrations of TCE considered safe are much lower than they use to be," the fact sheet reads.

Beginning in January 2017, EPA conducted sampling under the slab of some residences built directly over the former Petoskey Manufacturing facility site. The sampling looked for "soil gas," which is vapors trapped between soil particles. After preliminary results showed high levels of trichloroethylene under some units, EPA scheduled indoor air sampling this March to determine if TCE could also be detected in the air inside those residences. Results showed that some units did have levels of TCE that could pose a health risk. EPA and the local health department notified affected residents of the results and provided temporary air purification systems.

Additional sampling this spring helped EPA complete an engineering design of a long-term vapor mitigation system, which is now being installed. The agency is expanding its investigation to determine if vapor is moving from the former manufacturing facility site or the contaminated groundwater. EPA is prepared to install additional vapor mitigation systems, if necessary, officials note in a fact sheet about the project.

Officials said the testing process requires only residents to have an air sampling unit smaller than a standard-size propane tank in their home for a 24-hour period and allow crews to drill about a 2-inch diameter hole in the ground outside their home to collect air samples.

For now, officials have identified about 75 properties that they hope to include in their initial testing. Depending on the results of the initial testing, the area could be expanded to include more homes. The current round of testing essentially extends to properties that are about 100 feet from the edge of the groundwater contamination plume. That plume includes the northwest corner of the former Petoskey Manufacturing site and runs to the northwest, roughly to the edge of the circle parking area at the end of Water Street.

According to information provided by the Michigan Department of Health and Human Services, potential health effects from exposure to high levels of TCE include congenital heart defects, immune system function effects, liver and kidney problems, development of some cancers, and less severe concerns such as nose, throat and lung irritation, headaches, dizziness, loss of coordination, memory issues, and mood changes.

Officials are hoping to begin doing the testing work in the next several weeks, but say the larger project will take much longer.

If vapors are detected in a home, a ventilation system can be installed that will remove the vapors, officials said.

Anyone would like more information, may contact Heriberto León, community involvement coordinator with EPA, at (312) 886-6163 or leon.heriberto@epa.gov; or Owen Thompson, remedial project manager, at (312) 886-4843; or at thompson.owen@epa.gov.

EPA officials noted that representatives from the agency will always have a picture identification.

Follow @Steve_Zucker on Twitter.

Pro Football

Ex-NFL receiver Terry Glenn dead after Dallas-area wreck

NFL Overreactions: The Eagles are Super Bowl bound

Short-handed Seahawks no longer have same leeway for errors

Walsh's missed kick, failed fake FG cost Seahawks vs Falcons

Ryan's 2 TD passes enough as Falcons hold off Seahawks 34-31

MORE HOME

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 26 2017

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE
NOW THE
OFFICE OF LAND AND
EMERGENCY MANAGEMENT

Mr. Stephen P. Risotto
Senior Director
American Chemistry Council
700 Second Street, NE
Washington, D.C. 20002

Dear Mr. Risotto:

Thank you for meeting with the Office of Land and Emergency Management (OLEM) representatives on June 22, 2017, and your follow-up letter of June 28, 2017. In both the meeting and your letter, you raised concerns regarding the U.S. Environmental Protection Agency's (EPA) recommendation to consider early or interim cleanup actions to address indoor air exposure to trichloroethylene (TCE) at contaminated sites. Specifically, your concerns involved the scientific data behind and the implementation cost associated with the Office of Superfund Remediation and Technology Innovation (OSRTI) August 27, 2014, memorandum, *Compilation of Information Relating to Early/Interim Actions at Superfund Sites and the TCE IRIS Assessment*. Based on these concerns, you requested that the EPA suspend implementation of the 2014 memorandum and related regional memoranda until the completion and consideration of an ongoing TCE risk evaluation by EPA's Office Chemical Safety and Pollution Prevention (OCSPP).

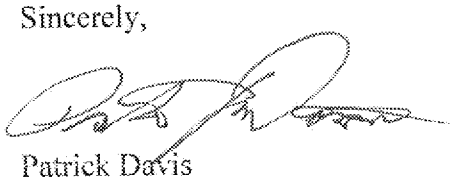
With respect to use of toxicity information in support of OLEM risk assessments, OLEM's use of the TCE Integrated Risk Information System (IRIS) assessment, first issued in 2011 and reaffirmed in 2016, is consistent with longstanding OLEM policy as reflected in the OSRTI memo cited above. Following the Office of Solid Waste and Emergency Response Directive 9285.7-53, when available, IRIS assessments are the preferred source of human health toxicity values. Consistent with OLEM policy, the 2014 memorandum did not direct regions to utilize a chronic reference concentration for short-term exposure. Rather, the 2014 OSRTI memorandum restated the findings of the 2011 IRIS evaluation and cited existing guidance about the use of early or interim actions and consideration of non-cancer health effects. We are aware of the ongoing hazard assessment for TCE that is currently being conducted by OCSPP which may incorporate additional data not considered by the IRIS program. When that assessment becomes available, OLEM will consider whether it would be appropriate to update our assessments for TCE to reflect the findings of the OCSPP assessment.

After canvassing EPA's regional offices, we have been unable to confirm that there has been a significant increase in remediation costs at TCE-contaminated Superfund sites as a result of the 2014 policy. A review of removal actions for sites with TCE, as recorded in EPA's Superfund Enterprise Management System (SEMS) database, failed to find any difference in the number of removals in the three years preceding the memorandum and the three years since the memorandum was issued (an

average of 11 per year). Additionally, the EPA is not aware of an increase in the costs of employing engineered exposure controls (e.g., subslab depressurization systems) as an interim response action for vapor intrusion.

While OLEM appreciates your concerns regarding EPA's approach for indoor air exposure to TCE from vapor intrusion, our 2014 memorandum is simply a compilation of existing information and guidance. We failed to find evidence of any significant cost impact associated with the memorandum. Since it is consistent with longstanding OLEM guidance and provides information useful to EPA regions, we currently plan to keep the 2014 memorandum and related regional memoranda in place. If new information becomes available, we will consider whether updates are appropriate.

Sincerely,



Patrick Davis
Deputy Assistant Administrator

Message

From: Chad Bradley Ex. 6
Sent: 6/7/2017 7:14:36 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
CC: McDaniel@wfs-dc.com
Subject: [SPAM] Meeting with Republic and Exelon RE: Westlake

Kell,

Thanks for your patience with me trying to get dates for Exelon to come in and talk about Westlake. As it turns out, Malloy McDaniel (who represents Republic) and I are old friends and we realized our respective clients are looking to talk to you about the same site. We wondered if it would better if we were to turn two meetings into one and have both PRP's meet with you at the same time. Our positions are closely aligned and the companies feel comfortable doing that, if you are comfortable with it.

If that works for you, we will get our folks together and come up with some days/times and get those to you.

Oh, and I mentioned your new job to John Sullivan (who is my partner) and he would like to join the meeting too once we get set up.

Hope you are well and Malloy and I look forward to hearing from you.

Thanks Kell.

Chad

Message

From: Yehuda Kaploun [Ex. 6]
Sent: 7/12/2017 3:09:48 AM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
CC: yehuda@us.water-gen.com
Subject: GEN–350G Medium Scale Atmospheric Water Generator – Water Gen

the medium unit

http://water-gen.com/products/water-from-air/gen-350g-medium-scale-atmospheric-water-generator/

GEN–350G

Medium Scale Atmospheric Water Generator

Awarded the "Atmospheric Water Generation for Forward Operating Base" CCD contract with the UK Ministry of Defense (March 2012). GEN-350G was exhibited at the NATO Capable Logistician Exercise as one of the two products representing the UK Ministry of Defense fields of innovation (May 2013). It is MIL-STD compliant and field proven.

The GEN-350G is a medium scale, and highly mobile water generator aimed for fast and easy deployment at all weather conditions. Weighing 800kg, the GEN-350 can be easily mounted on a small truck or SUV, servicing water to remote, and otherwise difficult to access locations. The GEN-350G includes the patented GENiusTM, **the world's most energy-efficient Atmospheric Water Generator (AWG) module of its kind.** The GEN-350G has an integrated energy optimization module, that constantly optimizes water production in accordance to external atmospheric conditions (day-night, seasons, geographic location, altitude etc.). The system has a built-in 200L water reservoir and a water treatment system, keeping the water fresh. The water can be dispensed directly from the system, either cold, or at ambient temperature.

Message

From: Yehuda Kaploun Ex. 6
Sent: 7/12/2017 3:08:27 AM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
CC: yehuda@us.water-gen.com
Subject: GENNY – Water From Air Home Appliance – Water Gen

as per our conversation the energy consumption for our small and medium units is about 1 gallon = 1 kw/h

http://water-gen.com/products/water-from-air/genny-water-from-air-home-appliance/

GENNY

The GENNY is small water from air generator that provides renewable source of clean and fresh drinking water for homes and offices. Requiring no infrastructure what so ever but electricity, it is literally a plug and drink solution, that can be installed in minutes anywhere, eliminating the daily dependency on bottled water. Employing state of the art, multi stage, Ozone based, water purification and circulation system, ensures water quality at premium levels, keeping them cool and fresh over time.

The system uses robust air filtration process, designed to operate at high air pollution conditions, venting back into the room ultra clean dry air. Ideal for families, the GENNY provides secured and reliable water source, indifferent to the quality or availability of the municipal water system.

Message

From: Genovese, Robert (BP) [Robert.Genovese@bp.com]
Sent: 8/15/2017 7:28:44 PM
To: Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]
Subject: RE: East Chicago groundwater - USS Lead site

Kell,

If you want to try to connect tomorrow, I would be available during 10:30-12:30 Eastern. I need to head to the airport for a flight after 12:30.

Thanks.

Bob

From: Genovese, Robert (BP)
Sent: Tuesday, August 15, 2017 12:56 PM
To: 'Kelly, Albert'
Subject: RE: East Chicago groundwater - USS Lead site

I'm available from 2:00-3:30 pm Eastern. Does this work?

Bob

From: Kelly, Albert [mailto:kelly.albert@epa.gov]
Sent: Tuesday, August 15, 2017 12:31 PM
To: Genovese, Robert (BP)
Subject: Re: East Chicago groundwater - USS Lead site

Do you have a time for a call today?

Sent from my iPad

On Aug 11, 2017, at 3:55 PM, Genovese, Robert (BP) <Robert.Genovese@bp.com> wrote:

> Kell,
>
> I'm glad that we had the opportunity to discuss Montana Superfund sites earlier this week. I'm hopeful that, after many years of sustained effort and the commitment of substantial resources, Atlantic Richfield will be able to progress these Superfund sites to remedy completion with an appropriate legal release and EPA will be able to remove the sites from the NPL.
>
> At the end of our meeting, we briefly discussed the USS Lead site in East Chicago. You asked me about AR's perspective on how to manage groundwater risk at this site. I'd like to share a few thoughts.
>
> Environmental risks have three elements:

1. Harmful levels of contaminants
2. Pathway for transmission
3. Presence of biological receptors (people and wildlife)

Eliminating any one of these elements eliminates the risk.

You indicated that groundwater testing needs to be conducted in the East Chicago community. I don't know the condition of the groundwater. However, if groundwater has been impacted, then cleanup may be impractical given the extensive use of non-native fill material and one hundred years of heavy industrial activity throughout the area. Removing people also seems impractical given the large number of people currently living in the community. Furthermore, the presence of people in the community is not an issue if there is no exposure pathway for contaminants in groundwater to reach people. Communities in East Chicago use municipal water from Lake Michigan. Groundwater is not used for drinking or agriculture in East Chicago.

Eliminating exposure pathways has been a demonstrated method to manage environmental risks. This can be accomplished through an Institutional Controls (IC) program. The EPA and ITRC have published studies about the effectiveness of IC programs that are properly designed and implemented. Atlantic Richfield has utilized IC programs in communities to protect people from exposure to contaminants in groundwater. These programs can operate at the local, county or state level.

You mentioned a potential exposure pathway through basement sumps. Typically, a sump that collects water intermittently is handling recent rainwater and does not mobilize contaminants. If sumps are collecting groundwater continuously and pose a risk to exposure, then sampling the sump water would provide information to assess if there is a basis for concern. I believe that DuPont has conducted some evaluation of basement sumps in Zone 3 related to their RCRA corrective action activities. I do not have the details.

Let me know if you would like to discuss further. I would be happy to provide experienced people from Atlantic Richfield who could offer input to the EPA as the agency considers next steps to address concerns in the East Chicago community.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone Ex. 6

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 12/11/2017 7:54:39 PM
To: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Subject: RE: Thanks for this morning's meeting

Thanks Steve. Thanks for coming in. I enjoyed the discussion

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
Sent: Monday, December 11, 2017 2:49 PM
To: Kelly, Albert <kelly.albert@epa.gov>
Cc: Falvo, Nicholas <falvo.nicholas@epa.gov>; Weinberg, Nadine <nadine.weinberg@erm.com>; Marc Himmelstein <Marc_Himmelstein@nes-dc.com>
Subject: Thanks for this morning's meeting

Kell –

Thanks for meeting with us this morning to discuss EPA's policy on TCE. Please let me know if you any follow-up questions or need additional information.

I will check in with you after the holidays.

Steve

Stephen P. Risotto
srisotto@americanchemistry.com
Ex. 6 (voice)
(mobile)

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 12/1/2017 2:57:32 PM
To: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Subject: RE: EPA policy regarding TCE remediation

ok

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
Sent: Friday, December 1, 2017 9:10 AM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: Re: EPA policy regarding TCE remediation

Thanks Kell -

How about 10 am on the 11th? I assume we'll meet at EPA HQ - I will let you know who will be attending from our end.

Steve Risotto
Sent from my iPhone

On Nov 30, 2017, at 7:13 PM, Kelly, Albert <kelly.albert@epa.gov> wrote:

> Morning is better
>
> Albert Kelly
> Senior Advisor to the Administrator
> 1200 Pennsylvania Avenue, NW
> Washington, DC 20460
> Ex. 6
>
> **From:** Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
> **Sent:** Thursday, November 30, 2017 7:01 PM
> **To:** Kelly, Albert <kelly.albert@epa.gov>
> **Subject:** Re: EPA policy regarding TCE remediation
>
> Kell -
>
> The 11th is probably best. What time works for you?
>
> Steve Risotto
> Sent from my iPhone
>
> On Nov 30, 2017, at 5:48 PM, Kelly, Albert <kelly.albert@epa.gov> wrote:

Sorry to have been non responsive. I have some time tomorrow and some time early Monday. Otherwise, it would have to be the 11th

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

-----Original Message-----
From: Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
Sent: Thursday, November 30, 2017 5:34 PM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: RE: EPA policy regarding TCE remediation

Kell -

Is there still a possibility to meet next week?

Steve
Stephen P. Risotto
srisotto@americanchemistry.com
Ex. 6 (voice)
(mobile)

-----Original Message-----
From: Kelly, Albert [mailto:kelly.albert@epa.gov]
Sent: Tuesday, November 21, 2017 12:33 PM
To: Risotto, Steve
Subject: Re: EPA policy regarding TCE remediation

Thanks Steve

Sent from my iPad

> On Nov 21, 2017, at 9:17 AM, Risotto, Steve <Steve_Risotto@americanchemistry.com> wrote:
>
> Kell –
>
> I have attached a short description of the issue we discussed related to remediation of trichloroethylene (TCE) contamination. Per your request, I have also included prior correspondence on the issue.
>
> As indicated, we would like to set up a meeting to review this issue with you.

Happy Thanksgiving.

Steve

Stephen P. Risotto

srisotto@americanchemistry.com<mailto:srisotto@americanchemistry.com>

Ex. 6 voice)

mobile)

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Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 12/1/2017 12:13:12 AM
To: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Subject: RE: EPA policy regarding TCE remediation

Morning is better

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
Sent: Thursday, November 30, 2017 7:01 PM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: Re: EPA policy regarding TCE remediation

Kell -

The 11th is probably best. What time works for you?

Steve Risotto
Sent from my iPhone

On Nov 30, 2017, at 5:48 PM, Kelly, Albert <kelly.albert@epa.gov> wrote:

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> Albert Kelly
> Senior Advisor to the Administrator
> 1200 Pennsylvania Avenue, NW
> Washington, DC 20460
> Ex. 6
>
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> From: Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
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> To: Kelly, Albert <kelly.albert@epa.gov>
> Subject: RE: EPA policy regarding TCE remediation
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> Kell -
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> Is there still a possibility to meet next week?
>
> Steve
> Stephen P. Risotto
> srisotto@americanchemistry.com

Ex. 6 (voice)
(mobile)

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Sent: Tuesday, November 21, 2017 12:33 PM
To: Risotto, Steve
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> Happy Thanksgiving.
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> Steve
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> Stephen P. Risotto
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> srisotto@americanchemistry.com<mailto:srisotto@americanchemistry.com>
>
> Ex. 6 (voice)
> (mobile)

++++++++++++++++++++++++++++++ This message may contain confidential information and is intended only for the individual named. If you are not the named addressee do not disseminate, distribute or copy this email. Please notify the sender immediately by email if you have received this email by mistake and delete this email from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 11/30/2017 10:48:47 PM
To: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Subject: RE: EPA policy regarding TCE remediation

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Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

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To: Kelly, Albert <kelly.albert@epa.gov>
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srisotto@americanchemistry.com
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(mobile)

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> Ex. 6 (voice)
> (mobile)
>

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 5/1/2018 8:09:12 PM
To: Genovese, Robert (BP) [Robert.Genovese@bp.com]
Subject: RE: Atlantic Richfield's petition to US Supreme Court in Christian v. Atlantic Richfield

Hello Bob, thanks for all your work and leadership on all of the sites. I wanted you to know that I am leaving EPA today. If I may ever be of help to you in the future, please call. My contact Ex. 6

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Genovese, Robert (BP) [mailto:Robert.Genovese@bp.com]
Sent: Friday, April 27, 2018 5:49 PM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: Atlantic Richfield's petition to US Supreme Court in Christian v. Atlantic Richfield

Kell,

I hope that you are doing well.

I have attached a copy of Atlantic Richfield's petition for a writ of certiorari filed today with the US Supreme Court for the *Christian v. Atlantic Richfield* litigation. Amicus briefs will be submitted by the end of May. All briefs will be filed by the end of July. The Court will consider the petition when it returns in September.

This litigation could have substantial impacts on the implementation of Superfund remedies, the EPA's authority under CERCLA, and the protections provided to cooperating PRPs through the consent decree process.

Let me know if I can provide any further information as I know that this case is of significant importance to the EPA.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone Ex. 6

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 1/8/2018 11:53:17 AM
To: Genovese, Robert (BP) [Robert.Genovese@bp.com]; Benevento, Douglas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93dba0f4f0fc41c091499009a2676f89-Benevento,]
Subject: RE: Montana Supreme Court opinion: Christian v Atlantic Richfield

Hello Bob. We too, saw and read the opinion. Together with our legal advisors, we would gladly have the phone conference referenced. If you would coordinate with Doug and his counsel, I will be sure I can catch on to the call.

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Genovese, Robert (BP) [mailto:Robert.Genovese@bp.com]
Sent: Friday, January 5, 2018 10:37 AM
To: Benevento, Douglas <benevento.douglas@epa.gov>; Kelly, Albert <kelly.albert@epa.gov>
Subject: Montana Supreme Court opinion: Christian v Atlantic Richfield

Doug and Kell,

I hope that you are doing well and had a relaxing break during the holidays.

Last week, the Montana Supreme Court issued the attached decision in the *Christian v Atlantic Richfield* case. The court ruled against Atlantic Richfield and rejected the views expressed by the Department of Justice in the amicus brief that the United States filed in the case. Atlantic Richfield had petitioned the Montana Court to hold that private landowners cannot use state law to require Atlantic Richfield to perform a remedy at the Anaconda NPL site that would be materially different than the clean up program that EPA has directed for over 30 years. As you know, under CERCLA, only the EPA has the authority to determine the remedy for a superfund site.

The Montana Supreme Court's decision opens the door for private landowners in Montana to develop their own remedies and to sue cooperating Potentially Responsible Parties to fund these disparate remedies even if they conflict with the EPA's selected remedy. Not only does this ruling challenge the EPA's authority under CERCLA to determine the appropriate environmental remedy, but it also undermines the integrity of the consent decree process in Montana since the regulated community cannot rely upon the remedy that the EPA selects to implement through a consent decree. A PRP could face an unending litany of conflicting remedies arising from private lawsuits that make it impossible to complete the clean up. This ruling creates a significant policy and legal matter for the EPA.

Atlantic Richfield intends to file a petition for writ of certiorari with the U.S. Supreme Court by the end of March. The Solicitor General will have the opportunity to submit an amicus brief in the U.S. Supreme Court supporting the company, which would be due at the end of April. In addition, the U.S. Supreme Court may request the views of the Solicitor General in response to the company's petition.

Obtaining review by the US Supreme Court is a difficult undertaking. Nonetheless, Atlantic Richfield believes that the case is worthy of Supreme Court review and that Supreme Court review is necessary to protect the interests of the United States. The odds of review would increase significantly if the Department of Justice files an amicus brief in support of Atlantic Richfield's petition for a writ of certiorari.

The United States previously filed an amicus brief in support of Atlantic Richfield in the State court proceeding and made oral arguments before the Montana Supreme Court. The DOJ's amicus brief for the State court proceeding is attached.

I would like to arrange a phone call with you to discuss this case and possible next steps to consider support from the EPA for a Supreme Court review of this matter. I think it would be efficient if the three of us could talk along with our legal advisors.

Let me know if you are open to scheduling a call during the next two weeks. If so, I will work with your assistants to arrange a time.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone Ex. 6

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 10/26/2017 1:39:30 PM
To: Ludwiszewski, Raymond B. [RLudwiszewski@gibsondunn.com]
CC: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]
Subject: Re: Gelman Site, Ann Arbor, MI

Hello Mr. Ludwiszewski, thank you for your email. I am available later in the day today and most of tomorrow. We can meet in person or by phone. Nick will coordinate a good time with you.

Sent from my iPad

> On Oct 26, 2017, at 8:54 AM, Ludwiszewski, Raymond B. <RLudwiszewski@gibsondunn.com> wrote:
>
> Kell –
>
> Due to his personal situation, Byron Brown asked that I reach out to you concerning a fast developing issue in Region V. I sent Bryon the below email with some background.
>
> Recently, Congresswoman Dingell sent to MDEQ the email copied below. Altho MDEQ and the petitioners have not received a response from Region V on the Preliminary Assessment, apparently Dingell has been told the outcome of the Preliminary Assessment and that Region V has decided to assign a "dedicated staffer" to the site "regardless of the outcome of the potential Superfund listing." This is despite MDEQ having formally informed Region V in writing that the issues at the Gelman site are being adequately addressed through the ongoing state enforcement action and that federal involvement is not warranted.
>
> I would be happy to discuss at your convenience.
>
> Thx,
>
> RAY
>
> ++
>
> Dear Ms. Shirey,
>
> Thank you for all of your dedication and hard work on the issues surrounding the dioxane plume. The plume impacts many different communities in Washtenaw County and it is essential that representatives from all levels of government, academic experts, and community advocates speak with one voice and work together to achieve a shared outcome.
>
> As you know, several communities have petitioned EPA to conduct a preliminary assessment of the dioxane plume to see if it is eligible to be added to the National Priorities List, otherwise known as the Superfund program. In my ongoing engagement with EPA on this issue, the agency has realized the significance of the plume and has decided to dedicate a staffer to oversee the plume from the federal level regardless of what happens with the potential superfund listing. Having EPA more actively involved in the day-to-day work around the plume is welcome news for this community. A goal we all share is providing our constituents the facts and the latest scientific data in plain language and in one easily accessible place.
>
> As a result of this action, EPA has requested to meet with all the stakeholders as they increase their engagement. To that end, this letter is to invite you to a meeting with representatives from the EPA on the morning of Monday November 13, 2017 to discuss our work on the plume and how we can all improve communications to the public on this important issue.
>
> The exact time and location of the meeting is still being determined, but please save the morning. If you have any questions, please do not hesitate to contact me directly, or you can be in touch with my District Director Callie Bruley at Ex. 6 or callie.bruley@mail.house.gov<mailto:callie.bruley@mail.house.gov>
>
>
> Sincerely,
>
> D
> Debbie Dingell
> Member of Congress
>
> Raymond B. Ludwiszewski

>
> GIBSON DUNN
>
> Gibson, Dunn & Crutcher LLP
> 1050 Connecticut Avenue, N.W., Washington, DC 20036-5306
> Tel [redacted] • Fax +1 202.530.9562
> RLudwiszewski@gibsondunn.com<mailto:RLudwiszewski@gibsondunn.com> •
www.gibsondunn.com<http://www.gibsondunn.com>
>
> From: Ludwiszewski, Raymond B.
> Sent: Wednesday, October 18, 2017 10:01 AM
> To: 'Brown.byron@epa.gov' <Brown.byron@epa.gov>
> Subject: Gelman Site, Ann Arbor, MI
>
> Byron,
>
> I wanted to reach out to alert you to Region V's upcoming decision concerning the Gelman Sciences 1,4-dioxane site in Ann Arbor, Michigan. As you may know, in November of last year, the Sierra Club and others petitioned EPA Region V to conduct a preliminary assessment of the Gelman site. Region V agreed to do so, promising a decision by November 2017 at the latest. Since then, as you can see from the attached news clippings, the political interest in the site and in EPA's involvement has grown.
>
> The site is governed by a consent judgment entered by a Michigan Court and has a long remediation history built on collaboration between the responsible state agency, the MDEQ, and the PRP – Gelman – reaching back over 20 years. Recently, MDEQ formally informed Region V in writing that the issues at the Gelman site are being adequately addressed through the ongoing state enforcement action, and that federal involvement is not warranted. Gelman is in full agreement with MDEQ that the site is being effectively managed by the State, consistent with Administrator Pruitt's vision of "cooperative federalism" as expressed by his statement at his confirmation hearing.
>
> Please let me know if you would like to meet or to discuss these issues on the phone. I appreciate your consideration. Also, if you have the opportunity, please pass my good wishes on to my friend and former colleague, David Fotouhi. I understand that you work together regularly.
>
> Thx, RAY
>
>
> Raymond B. Ludwiszewski
>
> GIBSON DUNN
>
> Gibson, Dunn & Crutcher LLP
> 1050 Connecticut Avenue, N.W., Washington, DC 20036-5306
> Tel [redacted] Fax +1 202.530.9562
> RLudwiszewski@gibsondunn.com<mailto:RLudwiszewski@gibsondunn.com> •
www.gibsondunn.com<http://www.gibsondunn.com>
> _____
> This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.
> _____
> <2017.06.12 - MLive - Peters discusses immigration, other issues.pdf>
> <2017.08.31 - MLive - Town Hall Meeting.pdf>
> <2017.01.18 - scott-pruitt-opening-statement-final-.pdf>

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 4/18/2018 6:00:48 PM
To: Miner, Robert [Robert.Miner@bp.com]; Benevento, Douglas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93dba0f4f0fc41c091499009a2676f89-Benevento,]
CC: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]
Subject: RE: Visit to Rico, Colorado site

Doug and I would very much value coming out to see the Rico site. I will attempt to make my schedule fit Doug's and yours so when he weighs in perhaps we can get this nailed down.

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Miner, Robert [mailto:Robert.Miner@bp.com]
Sent: Wednesday, April 18, 2018 9:13 AM
To: Kelly, Albert <kelly.albert@epa.gov>; Benevento, Douglas <benevento.douglas@epa.gov>
Cc: Falvo, Nicholas <falvo.nicholas@epa.gov>
Subject: Visit to Rico, Colorado site

Kell and Doug:

Patricia Gallery let me know about your interest in visiting the sustainable wetlands project at Rico, Colorado. Atlantic Richfield would be delighted to host you both there.

Could you offer us a few times in the next few months when you might be available to head to Rico for a tour with our Colorado team?

By the way, BP just released a very interesting report on our efforts to meet the world's growing energy demands while working to reduce our carbon footprint. I am including it in case you might be interested in taking a look.

Robert Miner
Head of State and Local Affairs
BP America
Ex. 6

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 10/25/2017 2:42:57 PM
To: Genovese, Robert (BP) [Robert.Genovese@bp.com]
Subject: RE: DOJ Amicus Brief for Christian v. Atlantic Richfield Company

Just to close the loop, I did have a discussion with our Deputy General Counsel, David Fotouhi and Assistant Attorney General Jeff Wood. They are aware of the concern and at this point have no immediate action but are continuing to review.

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Genovese, Robert (BP) [mailto:Robert.Genovese@bp.com]
Sent: Tuesday, October 24, 2017 4:25 PM
To: Benevento, Douglas <benevento.douglas@epa.gov>
Cc: Kelly, Albert <kelly.albert@epa.gov>
Subject: DOJ Amicus Brief for Christian v. Atlantic Richfield Company

Doug,

It was a pleasure to talk with you today. As a follow up to our conversation, I have attached the amicus briefs that the DOJ filed in the Christian v. Atlantic Richfield litigation with the Montana Supreme Court. DOJ filed an initial amicus brief dated November 15, 2016. This is a well written brief that explains the issues of concern for the EPA. Subsequently, the DOJ submitted a shorter version dated December 8, 2016 in order to comply with a 5000 word limit.

I suggest that you read the brief dated November 15, 2016 since it provides a more fulsome explanation of why the DOJ opposes the landowners' claim for restoration damages.

The brief was submitted by Matt Oakes, who also argued the DOJ's points before the Montana Supreme Court in April, 2017. Paul Logan and Andy Lensink supported this effort for EPA Region 8 legal team.

Let me know if I can provide any additional information. Separately, I will contact your office to schedule a meeting in Denver to discuss ideas to progress the Montana superfund sites.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone Ex. 6

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 11/17/2017 10:11:39 AM
To: Christian Palich [cpalich@ohiocoal.com]
Subject: Re: *No Longer with OCA* Re: Geological Competency

I am guessing you didn't intend to send me this?

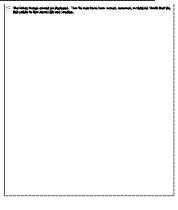
Sent from my iPad

On Nov 17, 2017, at 5:04 AM, Christian Palich <cpalich@ohiocoal.com> wrote:

> Effective Friday April 28th I have accepted a new position and will no longer be employed with the Ohio Coal Association, please call the Ohio Coal Association office at 614.228.6336 or email OCA board chairman Mike Carey at mcarey@coalsource.com for assistance.
>
> If you need to reach me in the future my personal email is Ex. 6
>
> Have a terrific day,
>
> Christian R. Palich

--
Christian R. Palich
President


Ohio Coal Association
17 South High Street, Suite 310
Columbus, OH 43215
(614) 228-6336 I Ex. 6 mobile
cpalich@ohiocoal.com I www.ohiocoal.com




Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 12/7/2017 7:15:31 PM
To: Risotto, Steve [Steve_Risotto@americanchemistry.com]
CC: Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]
Subject: Re: meeting Monday morning

Call my office when you arrive. I do not know yet on your second question

Sent from my iPhone

On Dec 7, 2017, at 2:12 PM, Risotto, Steve <Steve_Risotto@americanchemistry.com> wrote:

> Kell –
>
> It looks like there will only be 4 of us for the trichloroethylene (TCE) discussion on Monday –
>
> Myself
> Laura Brust, ACC
> Nadine Weinberg, Environmental Resources Management
> Marc Himmelstein, National Environmental Strategies
>
> Nadine and Marc are representing companies from our group.
>
> Marc tells me that the North Entrance to the Main building (across from the Trump Int'l Hotel) is the closest to your office. Shall I have the guards call your number (202-564-5086) when we arrive? Will anyone else from EPA be attending the meeting?
>
> Thanks again.

Steve
Stephen P. Risotto
srisotto@americanchemistry.com
Ex. 6 (voice)
(mobile)

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 9/25/2017 7:47:53 PM
To: Yehuda Kaploun [Yehuda@us.water-gen.com]

Yehuda, we are still awaiting the documents back from your lawyers and the machine to test. Can't do anything until we receive these. Thanks.

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ex. 6

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 10/23/2017 3:47:34 PM
To: Genovese, Robert (BP) [Robert.Genovese@bp.com]
Subject: RE: call

I will call your cell if that is ok

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Genovese, Robert (BP) [mailto:Robert.Genovese@bp.com]
Sent: Monday, October 23, 2017 9:22 AM
To: Kelly, Albert <kelly.albert@epa.gov>
Cc: Falvo, Nicholas <falvo.nicholas@epa.gov>
Subject: RE: call

Kell,

I'm not sure if you mean 11:00 Eastern today to tomorrow. Either way works. Let me know what number you would like me to call. Or, I can provide a conference call number if that helps.

Bob

From: Kelly, Albert [mailto:kelly.albert@epa.gov]
Sent: Monday, October 23, 2017 6:47 AM
To: Genovese, Robert (BP)
Cc: Falvo, Nicholas
Subject: RE: call

How about an 11 eastern call with Doug?

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Genovese, Robert (BP) [mailto:Robert.Genovese@bp.com]
Sent: Saturday, October 21, 2017 8:16 AM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: RE: call

Hi Kell,

Good to hear from you. I have a call scheduled with you and Nick on Tuesday morning at 9:00 Eastern to update you on the status of the Superfund sites that we discussed a few months ago.

I would welcome an introduction to Doug Benevento. I will make myself available to fit your schedules. I suggest that we hold the introductory call sometime after you and I have talked on Tuesday.

Thanks for offering to introduce me.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone Ex. 6

From: Kelly, Albert [mailto:kelly.albert@epa.gov]
Sent: Friday, October 20, 2017 4:14 PM
To: Genovese, Robert (BP)
Subject: call

Hello Mr. Genovese, hope you are well. Would you have time for a 15 minute phone conversation next week? I would like to introduce you by phone to the new Regional Administrator in Region 8.

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 10/23/2017 3:28:06 PM
To: Genovese, Robert (BP) [Robert.Genovese@bp.com]
Subject: RE: call

My apology. Tuesday at 11 eastern

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Genovese, Robert (BP) [mailto:Robert.Genovese@bp.com]
Sent: Monday, October 23, 2017 9:22 AM
To: Kelly, Albert <kelly.albert@epa.gov>
Cc: Falvo, Nicholas <falvo.nicholas@epa.gov>
Subject: RE: call

Kell,

I'm not sure if you mean 11:00 Eastern today to tomorrow. Either way works. Let me know what number you would like me to call. Or, I can provide a conference call number if that helps.

Bob

From: Kelly, Albert [mailto:kelly.albert@epa.gov]
Sent: Monday, October 23, 2017 6:47 AM
To: Genovese, Robert (BP)
Cc: Falvo, Nicholas
Subject: RE: call

How about an 11 eastern call with Doug?

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Genovese, Robert (BP) [mailto:Robert.Genovese@bp.com]
Sent: Saturday, October 21, 2017 8:16 AM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: RE: call

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I would welcome an introduction to Doug Benevento. I will make myself available to fit your schedules. I suggest that we hold the introductory call sometime after you and I have talked on Tuesday.

Thanks for offering to introduce me.

Best Regards,

Bob Genovese

President
Atlantic Richfield Company
Email robert.genovese@bp.com
Phone Ex. 6

From: Kelly, Albert [mailto:kelly.albert@epa.gov]
Sent: Friday, October 20, 2017 4:14 PM
To: Genovese, Robert (BP)
Subject: call

Hello Mr. Genovese, hope you are well. Would you have time for a 15 minute phone conversation next week? I would like to introduce you by phone to the new Regional Administrator in Region 8.

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 1/3/2018 9:36:56 PM
To: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Subject: RE: Thanks for this morning's meeting

Sure. Toward month end is better

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Risotto, Steve [mailto:Steve_Risotto@americanchemistry.com]
Sent: Wednesday, January 3, 2018 2:45 PM
To: Kelly, Albert <kelly.albert@epa.gov>
Cc: Falvo, Nicholas <falvo.nicholas@epa.gov>
Subject: RE: Thanks for this morning's meeting

Kell –

Is it possible to get together sometime in January to further discuss TCE?

Steve
Stephen P. Risotto
srisotto@americanchemistry.com
Ex. 6 (voice)
(mobile)

From: Risotto, Steve
Sent: Monday, December 11, 2017 2:49 PM
To: 'Kelly, Albert'
Cc: 'falvo.nicholas@epa.gov'; Nadine Weinberg (nadine.weinberg@erm.com); 'Marc Himmelstein'
Subject: Thanks for this morning's meeting

Kell –

Thanks for meeting with us this morning to discuss EPA's policy on TCE. Please let me know if you any follow-up questions or need additional information.

I will check in with you after the holidays.

Steve
Stephen P. Risotto
srisotto@americanchemistry.com
Ex. 6 (voice)
(mobile)

++++++++++++++++++++++++++++++ This message may contain confidential information and is intended only for the individual named. If you are not the named addressee do not disseminate, distribute or copy this email. Please notify the sender immediately by email if you have received this email by mistake and delete this email from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message which arise as a result of email transmission. American Chemistry Council, 700 – 2nd Street NE, Washington, DC 20002, www.americanchemistry.com

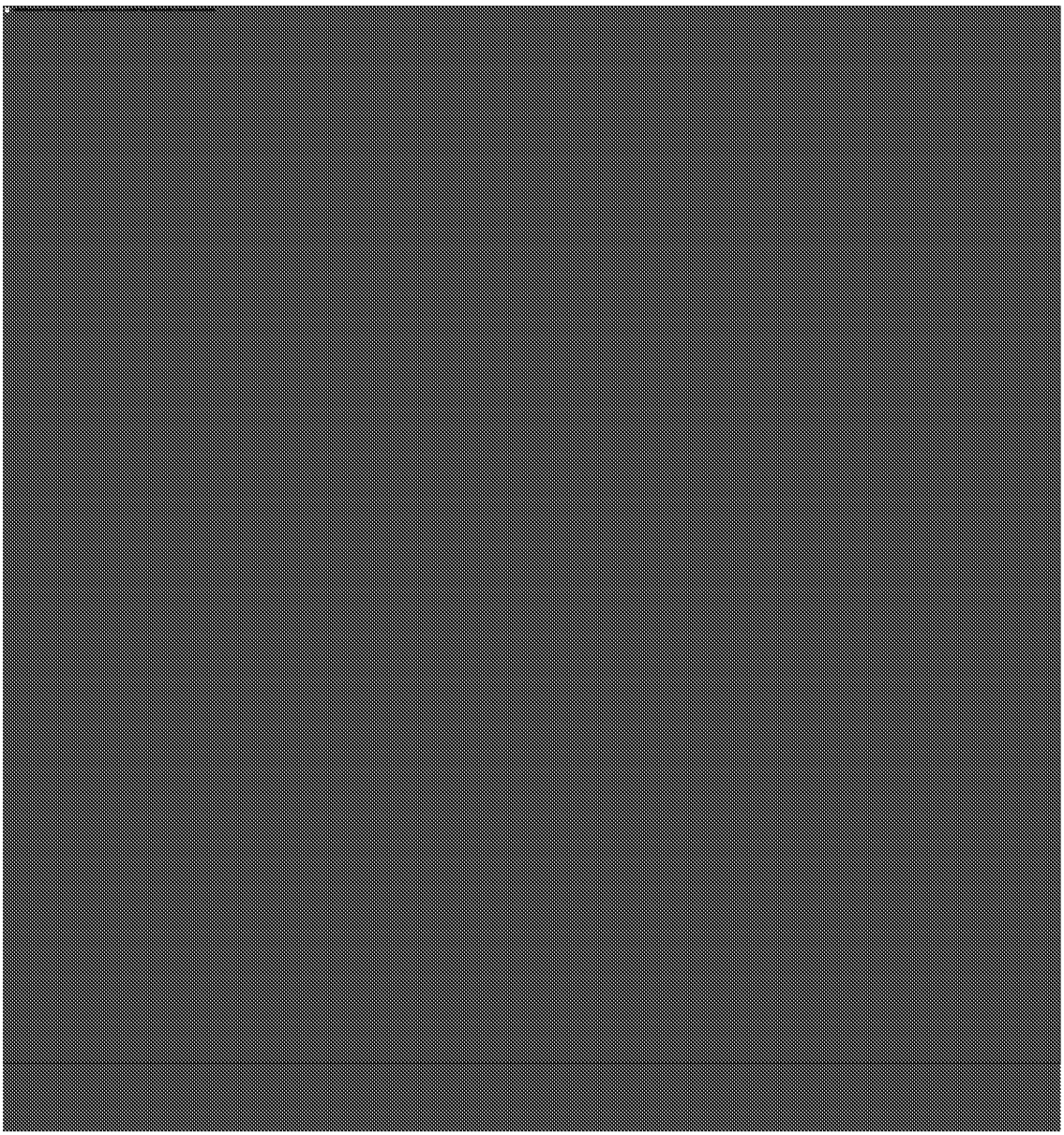
Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 7/27/2017 5:54:10 PM
To: Yehuda Kaploun [Yehuda@us.water-gen.com]
Subject: FW: Crisis in East Chicago, Indiana

What is the Akaline system?

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ex. 6

From: Jan Gorospe [mailto:Ex. 6@mail140.suw14.mcdlv.net] **On Behalf Of** Jan Gorospe
Sent: Thursday, July 27, 2017 1:36 PM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: Crisis in East Chicago, Indiana



Help end the crisis in East Chicago

Today we would like to ask you for your support in our mission to help supply 29,000 residents of East Chicago with Alkaline water (electrolyzed reduced

water). We would like to provide every home with a filter that will sustain the filtration of high amounts of lead, arsenic and other heavy metals. The Alkaline Water generating system will not only ensure that the residents are receiving clean water, but will also aid in the process of detoxification from heavy metals so that they can regain their normal health and wellbeing.

I'm sure many of you have heard about the heart shattering news of Flint, Michigan and their water contamination crisis. Michigan is now joined in the dubious catastrophie by yet another city just 25 miles east of downtown Chicago. East Chicago, Indiana's water lead contamination levels were reported to be shockingly nine times higher compared to Flint Michigan, yet received very little media attention. (1)

The issue was first recognized in 1985, but kept quiet only until about a year ago. As a result, the residents along with their children, have been ingesting this highly toxic water for over three decades and now the detrimental health affects are beginning to consume their lives. (2) East Chicago has the highest rate of miscarriages in the country, their cancer rates are exponentially rising and their children have some of the lowest test scores reported.

To try and minimize this tragedy, the Environmental Protection Agency, EPA has attempted to remedy this situation by replacing the pipelines and re-grounding the surrounding soil in these Superfund sites . This process will take years to accomplish, and the very limited attention towards their drinking water is causing a sense of helplessness among the residents. The EPA still cannot say that the water is safe (6), and despite the water filters and water bottles provided by the IDEM (Indiana Department of Environment Management), unfortunately this effort is not enough to improve the resident's health. (4)

Since there has been limited focus aimed towards improving the resident's wellbeing, and because it is cost prohibitive for small communities to mandate the EPA on water standards, we have taken it into our hands to help our residents get the clean water they deserve. We believe that no human being should ever be subjected to illnesses or degenerative diseases due to governmental mishaps, and the lack of good, clean and healthy water.

100% of your proceeds will go towards buying each residential home their own permanent Alkaline Water System , along with four replacement filters that will provide them with ultimate hydration, but most importantly aid their bodies in the excretion of high amounts of lead and other toxic metals.

We believe that there are many things in life people can worry about, but clean healthy water should certainly never be one of them.

Donate Now

Please help.




Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 7/27/2017 1:18:40 PM
To: Yehuda Kaploun [Yehuda@us.water-gen.com]
CC: Packard, Elise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6d4ad4c6abb24f54a2c8c16fa17ba0fd-Packard, El]
Subject: RE: We received the crada

Great news! You are in good hands with Jay. Let me know how things develop.

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ex. 6

From: Yehuda Kaploun [mailto:Yehuda@us.water-gen.com]
Sent: Thursday, July 27, 2017 8:01 AM
To: Kelly, Albert <kelly.albert@epa.gov>
Subject: We received the crada

We are having a call with jay and his group to discuss today to move forward as our lawyers and tech people have some questions about the testing and also some of the language

We will be moving forward as quickly as we can

Thank you

Yehuda Kaploun
President
WaterGen USA

Everyone has a right to drink clean water.

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 11/21/2017 5:32:40 PM
To: Risotto, Steve [Steve_Risotto@americanchemistry.com]
Subject: Re: EPA policy regarding TCE remediation

Thanks Steve

Sent from my iPad

> On Nov 21, 2017, at 9:17 AM, Risotto, Steve <Steve_Risotto@americanchemistry.com> wrote:
>
> Kell –
>
> I have attached a short description of the issue we discussed related to remediation of trichloroethylene (TCE) contamination. Per your request, I have also included prior correspondence on the issue.
>
> As indicated, we would like to set up a meeting to review this issue with you.
>
> Happy Thanksgiving.
>
> Steve
> Stephen P. Risotto
> srisotto@americanchemistry.com<mailto:srisotto@americanchemistry.com>
> Ex. 6 (voice)
> Ex. 6 (mobile)
>
> ++++++++++++++++++++++++++++++ This message may contain confidential information and is intended only for the individual named. If you are not the named addressee do not disseminate, distribute or copy this email. Please notify the sender immediately by email if you have received this email by mistake and delete this email from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message which arise as a result of email transmission. American Chemistry Council, 700 – 2nd Street NE, Washington, DC 20002, www.americanchemistry.com
> <ACC letter re TCE remediation policy.pdf>
> <OLEM Response.pdf>
> <ACC follow-up letter on TCE.pdf>
> <EPA to test for toxic vapors in some homes.pdf>

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 4/9/2018 10:18:01 PM
To: Robert.genovese@bp.com
Subject: Call

Hello Bob, I would like to have a short call with you when you have a few minutes
Sent from my iPad