No. 17-1498

In The Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, PETITIONER,

v.

GREGORY A. CHRISTIAN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONSE BRIEF FOR GREGORY A. CHRISTIAN, ET AL.

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QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) establishes standards and procedures that govern federal cleanups of hazardous waste sites while expressly preserving parties' rights to press state-law claims related to such sites. *E.g.*, 42 U.S.C. §§ 9614(a), 9652(d), 9659. Respondents here (collectively, "Landowners") brought a variety of state-law claims against petitioner Atlantic Richfield Company ("ARCO"), seeking to recover damages for the harm caused by ARCO's contamination of Landowners' residential properties. Among other things, Landowners request the funds necessary to remove ARCO's pollution from their land. In an interlocutory decision, the Montana Supreme Court held that Landowners could submit this damages request to a jury. The questions presented are:

1. Whether this Court has jurisdiction to review this interlocutory state-court decision.

2. Whether the Montana Supreme Court erred in concluding that CERCLA Section 113(h) does not prohibit Landowners from bringing an action in state court seeking the funds necessary to perform their own cleanup on their own properties once the EPA-ordered cleanup is complete.

3. Whether the Montana Supreme Court erred in concluding that Landowners are not "potentially responsible part[ies]" within the meaning of CERCLA

QUESTIONS PRESENTED—Continued

Section 122(e)(6) because, as non-polluting contiguous landowners protected by the statute of limitations, they could not be liable under CERCLA.

4. Whether the Montana Supreme Court erred in concluding that Landowners' damages request was not preempted.

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JURISDICTIONAL STATEMENT

This Court lacks jurisdiction. *Infra* pp. 17-21.

STATUTORY PROVISIONS

Relevant statutory provisions appear in the appendix.

INTRODUCTION

This is a case about property rights, federalism, and statutory text. ARCO and its predecessor emitted thousands of tons of toxic metals, contaminating Landowners' residential properties. Landowners brought state-law tort actions so they could remove this contamination. ARCO now claims CERCLA—a statute designed to *promote* hazardous-waste cleanup—prohibits Landowners from addressing the hazardous waste ARCO put on their property.

In ARCO's telling, CERCLA was a federal power-grab: Congress anointed EPA the supreme authority for all land-use decisions affecting anyone unlucky enough to live in a hazardous-waste site. ARCO insists that, once EPA orders polluters to conduct some cleanup on some small subset of the area they polluted, their obligations end. ARCO even claims Congress deprived state courts of jurisdiction over state-law nuisance claims and permanently barred private landowners from cleaning their own land.

If the Court finds it has jurisdiction, it should reject ARCO's attempt to rewrite CERCLA. ARCO

divines CERCLA's supposed purpose to nullify state law, confer permanent polluter immunity, and destroy private property rights from two isolated provisions. ARCO misreads both.

The first, Section 113(h), governs judicial review of EPA's orders. 42 U.S.C. § 9613(h). It applies only to suits (1) in federal court, (2) that advance federal claims, and (3) "challenge" (*i.e.*, seek review of) EPA orders. Landowners' claims are none of these, much less all three. ARCO's convoluted attempt to meld Section 113(h) with another section governing claims "arising under" CERCLA fails because Landowners' *state-law* claims do not "arise under" CERCLA. Regardless, ARCO's statutory mash-up does not solve its fundamental problem—Section 113(h) expressly permits state-law claims.

Section 122(e)(6), ARCO's second provision, preserves the status quo among "potentially responsible parties" by requiring EPA approval of cleanups while EPA negotiates CERCLA settlements. 42 U.S.C. § 9622(e)(6). As one might expect given its plain text and the settlement context it governs, this provision applies to parties that are "potentially" liable under CERCLA. Because Landowners face zero "potential[]" liability—as ARCO admits, claims against them would be time-barred (among other problems)—they are outside Section 122(e)(6)'s scope. ARCO's contrary interpretation assumes Congress used this obscure corner of CERCLA to grant EPA the (likely unconstitutional) authority to forever dictate whether homeowners may dig even a shovelful of dirt in their own backyards.

Relying on some combination of these two provisions and atextual incantation of statutory "purpose," ARCO also invokes preemption. Yet ARCO hardly faces the Scylla and Charybdis of impossibility preemption. Federal law did not require ARCO to *pollute* Landowners' land (the basis for Landowners' tort claims), and it does not now prohibit ARCO from funding Landowners' effort to restore it. Equally unsupported is ARCO's contention that Congress viewed *any* additional cleanup as an obstacle to CERCLA's purpose. Indeed, it is unclear what more Congress could have done to protect such state-law efforts: it enacted three separate anti-preemption provisions expressly authorizing state-law claims.

STATEMENT

A. Statutory Background

Congress enacted CERCLA to address the "serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). Previously, States were responsible for hazardous-waste remediation, leaving the federal government powerless to respond to unfolding environmental catastrophes like Love Canal. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 & n.5 (2d Cir. 2010). CERCLA remedied this situation by allocating money to "facilitate government cleanup of hazardous waste" (the Act's "Superfund"), *Exxon Corp. v. Hunt*, 475 U.S. 355, 359-60 (1986), and ensuring "the costs of such cleanup

efforts were borne by those responsible for the contamination," *Burlington*, 556 U.S. at 602.

CERCLA "does not provide a complete remedial framework," but rather supplements State efforts. *CTS Corp. v. Waldburger*, 573 U.S. 1, 18 (2014). Congress included numerous anti-preemption provisions that preserve state-law remedies, making clear "[n]othing in th[e 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." 42 U.S.C. § 9614(a).[1] CERCLA's only express preemption provision *expands* the scope of state-law tort actions by barring polluters from invoking restrictive statutes of limitations. *Id.* § 9658.

CERCLA complements State efforts by granting EPA "broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). After designating a site for cleanup, EPA "may clean up a contaminated area itself" or "compel responsible parties to perform the cleanup."

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[1] *See also id.* § 9652(d) ("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."); *id.* § 9659(h) ("This [Act] 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 [42 U.S.C. § 9613(h)] or as otherwise provided in [42 U.S.C. § 9658] (relating to actions under State law).").

Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 161 (2004).

Section 107 delineates the "[c]overed persons" who may be liable for EPA's cleanup. 42 U.S.C. § 9607(a). As relevant here, "the owner and operator" of a contaminated "facility" is "liable" for all "costs of removal or remedial action." *Ibid*. While the class of "covered persons" is broad, other CERCLA provisions limit ultimate liability to those "responsible for the contamination." *Burlington*, 556 U.S. at 602. For example, Section 107(q) establishes that persons owning "real property that is contiguous to" property from which hazardous substances were released "shall not be considered to be an owner or operator" of a "facility." 42 U.S.C. § 9607(q). Meanwhile, Section 113(g) imposes a temporal cutoff, requiring that Section 107 "action[s] for recovery of costs" be brought "within 6 years after initiation of physical on-site construction of the remedial action." *Id.* § 9613(g)(2).

Section 122, titled "Settlements," establishes a framework for negotiations between EPA and "potentially responsible part[ies]," enabling them to fix their "liability to the United States." *Id.* § 9622(c)(1). Subsection (e), entitled "Special notice procedures," creates mechanisms to ensure all "potentially responsible parties" can participate in settlement negotiations. *Id.* § 9622(e). Subsection (e)'s sixth subpart 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 feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

Id. § 9622(e)(6).

CERCLA Section 113 governs court jurisdiction over CERCLA actions. Section 113(b) provides:

> Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA] * * * .

Id. § 9613(b). The referenced subsection (a) requires that challenges to CERCLA regulations be brought in the D.C. Circuit. *Id.* § 9613(a).

Section 113(h), in turn, is entitled "Timing of review." *Id.* § 9613(h). It 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 clean-up 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 * * * .

Ibid. This limit on federal jurisdiction is subject to five exceptions. *Ibid.*

B. Factual Background

1. While ARCO emphasizes the large geographic scope of its remedial obligations in Montana, *e.g.*, Pet. 34, this case involves 77 modest residential properties in the tiny community of Opportunity.

For nearly 100 years, the Anaconda Company (ARCO's predecessor) and ARCO operated a copper smelter next to Opportunity. Pet. App. 4a. This smelter emitted thousands of tons of toxic metals, including up to 62 tons of arsenic and 10 tons of lead daily. Landowners' App. 1:30. Arsenic and lead are both extremely toxic—ranked first and second on the priority list for poisons of the Agency for Toxic Substances and Diseases. Supplemental Expert Disclosure of William Meggs 4 (July 6, 2018). Much of ARCO's emissions landed on Landowners' properties, which lie a few miles downwind (and close to a community EPA forcibly evacuated due to contamination). J.A. 65.

The presence of these toxic metals causes Landowners understandable distress. Duane Colwell—who has lived at his property in Opportunity since 1959—has long worried that his family's health is affected by the pollution. Landowners' App. 14:11. Similarly, Franklin Cooney explained, "I want it where there's no contamination for my kids and grandkids, especially, my little ones." *Id.* at 14:15.

Yet Landowners do not want to abandon their homes. John Rusinski has lived in Opportunity for over 40 years. ARCO MSJ Restoration Br., App. A. He and his wife "raised [their] daughter" there, and they do not "want to move." Landowners' MSJ Reasons Personal, Ex. 4 at 19. As Charles Walrod put it, "I couldn't find a kitchen door that's got all my kids' heights on it." *Id.*, Ex. 6 at 16.

2. In 1983, EPA designated the 300-square-mile area surrounding the Anaconda smelter a Superfund site. Pet. App. 4a. It identified ARCO "as the Potentially Responsible Party (PRP) for th[e] site." J.A. 64.

Through a series of orders, EPA required ARCO to take specified remedial actions. It directed ARCO to remove up to 18 inches of soil in residential yards with arsenic levels exceeding 250 ppm. J.A. 94-95. (For reference, a level over 100 ppm is too toxic for local landfills, J.A. 389, EPA has elsewhere set a threshold of 25 ppm, Deposition of Richard Bartlett, Ex. 3 (Nov. 15, 2013), and many States set residential cleanup levels at 0.04 ppm, Landowners' App. 17:3). In EPA's view, the 250 ppm threshold would "reduce the level of overall risk" to human health "close to" a tolerable level. J.A. 82; *see* 42 U.S.C. § 9621(d). For so-called "pasture land"—anything more than 125 feet from the center of the house (roughly the distance from home plate to second base)—EPA set an action level of 1,000 ppm and directed ARCO to reseed such areas. Water, Waste and Soils Record of Decision (ROD) §§ 7.1.1(4), 8.2.1 (1998). For cost reasons, EPA did not order soil removal. *Id.* § 7.1; *see* 42 U.S.C. § 9621(d)(4)(C) (permitting EPA

to decline to enforce protective standards where "technically impracticable"). Similarly, EPA recognized groundwater in Opportunity remained contaminated, but it deemed the remedies it considered "technically impracticable." J.A. 157-58. In none of these orders did EPA find that additional cleanup efforts would adversely affect anything other than ARCO's pocketbook.

Although it has made improvements, ARCO has not restored the land to its former bucolic glory, as its brief suggests. While the "immediate vicinity of the smelter is now a state park" (Br. 15), no children frolic among acres of lush vegetation. The State took control of the site to preserve the historic smokestack, which ARCO intended to demolish. Anaconda Chamber of Commerce, Anaconda Stack Brochure.[2] Because the area remains dangerously contaminated, the public is not allowed to visit this "park," but must view the smokestack from a safe distance (through fences and between massive slag piles). *Ibid.*

ARCO completed all EPA-ordered work on Landowners' properties in 2016. Pet. App. 47a. In total, 24 of the 77 Landowner properties were partially remediated, comprising about 5 percent of Landowners' total acreage. Landowners' S.Ct. Rehearing Pet., Ex. 1 at 3-5; Supplemental Expert Disclosure of Richard Pleus 11 (May 2, 2016); Expert Report of Thomas Jackson, Ex. 1 (Apr. 15, 2013). The vast majority of Landowners' land thus remains unremediated and covered in ARCO's toxic metals. Tammy Peters, for example, has

[2] *Available at* http://stateparks.mt.gov/fwpDoc.html?id=83581.

a daycare playground near which the arsenic level is 292 ppm. Expert Report of Joyce Tsuji 52 (Apr. 15, 2013). But because the "weighted average" results for her yard were below 250 ppm (and because the playground itself is in "pasture" more than 125 feet from the center of her house), ARCO performed no remediation. Landowners' S.Ct. Rehearing Pet., Ex. 1 at 3-5.

C. Procedural History

1. Seeking to address this contamination, Landowners sued ARCO in Montana state court. They advanced a number of state-law claims, including trespass and nuisance. J.A. 45-51. As remedies, Landowners sought five types of damages, including the diminution in value of their properties and the costs of "restoration." J.A. 54.

Only the "restoration" damages are at issue here. Under Montana law, "the diminution in value" of the plaintiff's property "generally constitutes the appropriate measure of damages." *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086 (Mont. 2007). Yet the Montana Supreme Court—like many other state courts—has recognized that such damages will not always fulfill tort law's purpose of putting " 'an injured person in a position as nearly as possible equivalent to his position prior to the tort.' " *Id.* at 1087-90. If the plaintiff plans to live at the damaged property, not sell it, diminution in market value will not "reimburse that owner for the actual loss suffered." *Id.* at 1087. In such circumstances, damages measured by the

restoration cost "constitute[] the only remedy that affords a plaintiff compensation." *Ibid.*; *see* Restatement (Second) Torts § 929, cmt. b. To prevent windfalls, plaintiffs seeking such damages must demonstrate "an award of restoration damages actually will be used to repair the damaged property." *Sunburst*, 165 P.3d at 1089.

Landowners want to stay in their homes, so they seek funds to remove the contamination remaining on their properties. Landowners contemplate removing up to 24 inches of soil from portions of their yards containing greater than 15 ppm arsenic (the natural level of arsenic in area soil). J.A. 72-73, J.A. 239. Because much of this soil is too toxic for local landfills, Landowners plan to deposit it where ARCO deposited the contaminated soil it removed. Supplemental Expert Disclosure of John Kane (Sept. 27, 2018). Landowners also propose installing permeable walls to remove ARCO's arsenic from their groundwater. J.A. 239-40.

Landowners' restoration plans have evolved over the years. CVSG Br. 10. Initially, it was not clear ARCO would perform *any* remediation on Landowners' properties. J.A. 239. But after the Montana Supreme Court reversed an order dismissing Landowners' claims on statute-of-limitations grounds, *Christian v. Atl. Richfield Co.*, 358 P.3d 131 (Mont. 2015), ARCO finally mobilized to conduct the EPA-mandated cleanup. Landowners then submitted a revised plan that took account of the (limited) soil ARCO had already removed. J.A. 389.

Any restoration damages Landowners secure will be held in trust. Pet. App. 5a. A controller will expend the funds as restoration work proceeds. *Ibid.*

2. The parties cross-moved for partial summary judgment on ARCO's CERCLA-based affirmative defenses. *See* Answer 10-11. While conceding CERCLA permitted Landowners' other damages theories, ARCO contended Landowners' restoration-damages request was a "challenge" precluded by CERCLA Section 113(h), and that Landowners were Section 122(e)(6) "potentially responsible parties" who could not remove contamination from their yards without EPA approval. J.A. 323-24, 327. ARCO did not raise any conflict-preemption argument, calling the "concept" "irrelevant." J.A. 348.

In a proposed amicus brief, EPA declined to support ARCO's categorical view that all Superfund property owners are Section 122(e)(6) "potentially responsible parties." ARCO App. 555. Instead, EPA noted that "[t]here are defenses to CERCLA liability for 'innocent landowners' and 'contiguous property owners,'" and it took "no position as to the ultimate issues of fact to be considered in weighing the applicability of these exclusions." *Ibid.*

The district court denied ARCO's motion and granted Landowners'. As it explained, Landowners do not "challenge" EPA's orders. Pet. App. 48a. It also found that ARCO pointed to nothing demonstrating Landowners were "potentially responsible parties." Pet. App. 53a. Finally, it concluded ARCO had not met

its summary-judgment burden as to whether Landowners' "restoration plan would conflict with ongoing EPA investigation and cleanup." Pet. App. 54a.

3. ARCO successfully petitioned the Montana Supreme Court for interlocutory review. Pet. App. 3a.

In an amicus brief, EPA modified its position on whether Landowners are "potentially responsible parties," deeming it "likely" that many are. Pet. App. 64a. EPA now believed Section 107(a)(1) (governing "covered persons") "designates current owners of contaminated property as PRPs" unless they satisfy the "requirements" of CERCLA's contiguous-landowner exception. Pet. App. 79a.[3]

EPA's amicus brief also suggested Landowners' proposed remediation might cause environmental harms. It cited no evidence for that speculation. Pet. App. 73a-74a. At oral argument, EPA clarified that it had not fully evaluated Landowners' plan, and that its prior orders had not rejected Landowners' proposed remediation actions. MT Oral Arg. 32:14-53, 38:26-39:08. Counsel further acknowledged that aspects of Landowners' contemplated cleanup "might be something that EPA could authorize." *Id.* 41:34-48; *see* BIO 14 n.2.

4. The Montana Supreme Court affirmed. It observed that Section 113(h) governs "*Federal*"

[3] Only in a later letter to Landowners' counsel—sent just before ARCO petitioned for certiorari—did EPA adopt the absolutist position that all property owners in Superfund sites are potentially responsible parties. Br. App. 1a.

jurisdiction and contains no "reference to state court jurisdiction over state law claims." Pet. App. 9a. Regardless, the court continued, Landowners' restoration-damages request was no Section 113(h) "challenge." Pet. App. 11a-12a. Because "CERCLA's regulatory standards do not apply to the common law claim at issue," EPA's remedial orders "ha[ve] no bearing on [its] success or failure." Pet. App. 14a.

The court also held Section 122(e)(6) inapplicable. It rejected ARCO's argument that "even if [Landowners] were able to avail themselves of a defense to liability for cleanup costs, they would still" be Section 122(e)(6) "potentially responsible parties." Pet. App. 16a. The court further explained that even if CERCLA claims *could* have been advanced against Landowners, "the statute of limitations for such a claim (at most six years from the date cleanup work was initiated) ha[d] long passed." *Ibid.*

Finally, the court held CERCLA did not "expressly or impliedly preempt" Landowners' restoration-damages request. Pet. App. 17a-18a.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction. It has jurisdiction over only *final* state-court judgments, but the decision below is interlocutory. There is no exception to this finality mandate for state-court decisions arising from supervisory writs. This Court has exercised jurisdiction over such decisions only where reversal would terminate the proceedings. Because that is not true here, this Court should dismiss.

II. Nothing in CERCLA deprives state courts of the power to entertain state-law tort claims. Section 113(h) itself is inapplicable, as ARCO does not dispute. First, Section 113(h) applies only in "Federal court." Second, Section 113(h) expressly exempts state-law claims (*i.e.*, "diversity" actions).

ARCO cannot import Section 113(h) into state court via Section 113(b). Section 113(b) grants federal courts exclusive jurisdiction only over cases "arising under" CERCLA. This case does not "aris[e] under" CERCLA because Landowners do not press CERCLA claims. Nothing in CERCLA suggests that Congress intended the well-known phrase "arising under" to encompass any claim Section 113(h) might prohibit. Even if it had, state-law claims would not "aris[e] under" CERCLA because Section 113(h) does not prohibit them even in federal court.

Section 113(h) is also inapplicable because Landowners do not "challenge" any EPA order. Section 113(h) precludes premature judicial review of EPA's orders. Landowners' state-law claims do not turn on

the validity of EPA's orders; indeed, Landowners have sought to exclude them as irrelevant. Because Landowners' claims do not depend on proof EPA erred, Landowners press no Section 113(h) "challenge."

III. Section 122(e)(6) does not bar restoration damages. It applies only to "potentially responsible part[ies]," and Landowners face no "potential[]" CERCLA liability because the statute of limitations has run. ARCO attempts to equate "potentially responsible party" with the "covered persons" defined in Section 107(a). But this Court has never held the two are the same, and CERCLA's text and structure show they are not. CERCLA uses "potentially responsible party" in provisions governing settlement negotiations; the phrase encompasses only those parties that face some risk of liability and thus might settle. ARCO's contrary contention—that Congress, in a narrow provision governing settlement mechanics, granted EPA a perpetual veto over every decision innocent landowners make on their own properties—would raise serious constitutional concerns.

Even assuming CERCLA "potentially responsible parties" and "covered persons" were the same, Landowners still would not be covered. Section 107(q) expressly exempts "contiguous" landowners—those whose property was polluted by an unrelated entity—from the definition of "covered persons." ARCO has failed to show Landowners fall outside this exception.

Finally, even if Landowners were "potentially responsible parties," remand would be needed for the

Montana courts to determine how an EPA-authorization requirement affects Landowners' requested state-law remedy.

IV. Landowners' request for restoration damages is not preempted. "Impossibility" preemption is inapposite because ARCO may readily comply with both Montana and federal law. Landowners' restoration-damages request imposes no restoration *duty* on ARCO; rather, ARCO is subject to this remedy because it violated its state-law obligations in *polluting* Landowners' land. Regardless, ARCO could comply with any hypothetical restoration duty by seeking EPA's consent. Nothing in the record suggests EPA would refuse to let ARCO (let alone Landowners) undertake restorative work.

Landowners' restoration-damages request is also not an "obstacle" to CERCLA's purposes. ARCO cites no statutory provision demonstrating Congress intended EPA's remedial orders to set a *ceiling* on cleanup. To the contrary, CERCLA's text, including its numerous anti-preemption provisions, demonstrates Congress expressly contemplated that additional remediation efforts would occur.

ARGUMENT

I. THIS COURT LACKS JURISDICTION

This Court should dismiss the writ of certiorari for lack of jurisdiction. Although the government previously warned of jurisdictional "uncertainty" (CVSG Br.

8-9; *see* SG Br. 16), ARCO makes a bald assertion of jurisdiction "under 28 U.S.C. § 1257(a)." Br. 1. But Section 1257(a) limits this Court's review of state-court decisions to "[f]inal judgments or decrees"—something the decision below is not.

To be "final," a state-court decision must be "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). This requirement "avoids piecemeal review" and minimizes "federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). The Montana Supreme Court's "remand[]" (Pet. App. 18a) does not satisfy the ordinary prerequisites of finality. *E.g.*, *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982).

Nor does this case satisfy any of Section 1257's recognized exceptions. In *Cox Broadcasting Corp. v. Cohn*, the Court distilled "four categories" of cases in which it permitted "a departure from this requirement of finality." 420 U.S. 469, 477 (1975) (quotation marks omitted). ARCO invokes only the fourth exception (Cert. Reply 2), but it is inapplicable. Certiorari jurisdiction extends to cases where (1) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and (2) "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. Neither is true here. Opp. 17-18. Even if this Court were to reverse, litigation would proceed on *all* Landowners' causes of action—restoration damages are

just a remedy. And as the government acknowledged in recommending denial of certiorari (CVSG Br. 9 n.4), declining immediate review would not erode any federal interest.

ARCO has argued (Cert. Reply 1-2), and the government now begrudgingly suggests (SG Br. 16), that this Court should recognize a fifth exception: where state-court appellate proceedings are denominated "original." To be sure, the Montana Supreme Court reviewed the district court's order after granting ARCO's petition for a writ of supervisory review, and so the proceedings were labeled "original." Pet. App. 1a. But aside from this label, nothing distinguishes a supervisory writ from a discretionary interlocutory appeal: the standard of review and even the record are precisely the same. Pet. App. 6a.

There is certainly no distinction between supervisory and appellate proceedings relevant to the logic underlying this Court's Section 1257 jurisprudence. It would make little sense to authorize piecemeal review, and sanction federal-court interference in state affairs, *North Dakota State Bd.*, 414 U.S. at 159, due to the happenstance that a case caption says "original" rather than "on appeal." Because the finality requirement is critical to "the smooth working of our federal system," it is "not one of those technicalities to be easily scorned." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Although the Court has twice exercised jurisdiction where the Montana Supreme Court granted an

"original" petition for supervisory review, it never recognized the proposed fifth exception. In both cases, the underlying decisions involved "original proceedings in a state appellate court, *in which the only issue decided concerns the jurisdiction of a lower state court*." *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382, 385 n.7 (1976) (emphasis added); *see Kennerly v. District Court*, 400 U.S. 423, 424 (1971) (same). That is, this Court's reversal would terminate the lawsuit entirely. These decisions thus reflect straightforward applications of *Cox*'s fourth exception: "reversal of the state court on the federal issue would be preclusive of any further litigation." 420 U.S. at 482. The same goes for other decisions arising from similar writ proceedings, all of which involved challenges to the trial court's jurisdiction. *See*, *e.g.*, *Madruga v. Superior Court of California*, 346 U.S. 556, 557 & n.1 (1954); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 565-67 (1947); *Bandini Petroleum Co. v. Superior Court, Los Angeles County*, 284 U.S. 8, 13-14 (1931); *Missouri ex rel. St. Louis B. & M. Ry. Co. v. Taylor*, 266 U.S. 200, 206 (1924); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 30-31 (1916). Where that requirement is not met, this Court has dismissed for lack of jurisdiction. *Arceneaux v. Louisiana*, 376 U.S. 336, 337-38 (1964).

Contrary to the government's contention (SG Br. 17), there is thus a "sound rationale" for understanding these decisions to turn, as *Fisher* expressly stated, on whether the decision reviewed resolves the trial court's jurisdiction over the case. 424 U.S. at 385 n.7. In such

situations, reversal would ensure "no trial at all" is needed, and thus this Court's intervention does not present the same threat of piecemeal review and unwarranted federal intrusion. *Cox*, 420 U.S. at 485. While earlier decisions such as *Bandini* did not expressly "treat that fact as dispositive" (SG Br. 17), they long predated *Cox*'s more careful enumeration of the circumstances in which certiorari jurisdiction will lie. They should not be understood to create an additional exception to Section 1257's finality mandate unmoored from its purpose. The petition should be dismissed.

I. CERCLA DOES NOT DEPRIVE THE STATE COURT OF JURISDICTION

Congress took care to ensure that nothing in CERCLA would be understood to "affect or modify in any way the obligations or liabilities of any person" under the "common law." 42 U.S.C. § 9652(d); *see infra* pp. 62-64 (discussing anti-preemption provisions). Section 113's jurisdictional provisions are no exception. As their text, structure, and history confirm, Congress consciously crafted these provisions to allow state-law claims like Landowners' to proceed unimpaired.

A. CERCLA Permits State-Court, State-Law Claims

1. ARCO does not contend Section 113(h) itself bars Landowners' claims. But that provision's language remains critical: "No Federal court shall have jurisdiction under Federal law other than under

section 1332 of title 28 (relating to diversity of citizenship jurisdiction) * * * to review any challenges to removal or remedial action selected under [Section 104], or to review any order issued under [Section 106(a)] * * * ." 42 U.S.C. § 9613(h). Two aspects of Section 113(h)'s text preclude any contention that Congress stripped state courts of jurisdiction over the tort suits they entertained for generations. ARCO and the government acknowledge the first, but they conspicuously ignore the second.

First, Section 113(h) governs the "jurisdiction" of "*Federal* court[s]." *Id.* (emphasis added). The plain meaning of "Federal court" is federal court. By its express terms, Section 113(h) does not apply in state courts.

Second, even in federal court, Section 113(h) *exempts* actions "under section 1332 of title 28 (relating to diversity of citizenship jurisdiction)." *Id*. The cross-referenced statute is, of course, the jurisdictional provision under which federal courts generally consider state-law actions. 28 U.S.C. § 1332. "Thus, section 113(h) permits a federal court to hear a challenge to a federal cleanup initiated under CERLCA if the challenge arises as, for instance, a state-law nuisance action." *Village of DePue, Ill. v. Exxon Mobil Corp.*, 537 F.3d 775, 784 (7th Cir. 2008). In other words, Section 113(h) applies "only * * * if the challenge arises

under federal law"—not to state-law claims like Landowners'. *Ibid.*[4]

Neither ARCO nor the government attempts to reconcile the theory that CERCLA strips state courts of jurisdiction over state-law actions with the fact that CERCLA's key jurisdiction-stripping provision expressly *exempts* state-law actions.

2. Recognizing Section 113(h)'s limitation to "Federal" courts, ARCO turns to Section 113(b) in its search for a barrier to this state-court action. "Except as provided" in Section 113(h) (and one other provision), Section 113(b) grants "the United States district courts * * * exclusive original jurisdiction over all controversies *arising under* [CERCLA]." 42 U.S.C. § 9613(b) (emphasis added). ARCO contends that, by some osmosis, Section 113(b) precludes Section 113(h) "challenges" in state court. But Section 113(b) does not import Section 113(h) into state court, and Section 113(h) would not preclude state-law claims even if it

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[4] Section 113(h) also mentions state-law claims involving "applicable or relevant and appropriate" state law, which refers to state-law standards EPA incorporates into CERCLA cleanups. 42 U.S.C. § 9621(d). It is unclear whether such claims constitute a second exception to Section 113(h)'s jurisdiction-stripping mandate (Br. 26) or, more likely, an additional category of prohibited "challenges" (*Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828, 831 (9th Cir. 1999)). Regardless, Landowners' claims invoke no "applicable or relevant and appropriate" state law (*infra* p. 61 n.12), and Section 113(h)'s reference to "diversity" jurisdiction unequivocally delineates a category of cases federal courts may entertain.

did. For both of these reasons, Section 113(b) provides ARCO no shelter.

a. Section 113(b) does not create exclusive federal jurisdiction over state-law claims like Landowners' because they "aris[e] under" state law, not CERCLA. Section 113(b)'s coverage of cases "arising under" CERCLA is familiar: it parallels the "arising under" jurisdiction of the federal-question statute, 28 U.S.C. § 1331. And Landowners' claims do not satisfy the traditional "arising under" requirements recognized in that context—as neither ARCO nor the government disputes.

"Under the longstanding well-pleaded complaint rule, * * * a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon federal law.'" *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (alterations omitted). Landowners' state-law complaint does not meet that test. ARCO injected any CERCLA issues as *defenses*, and "federal-court jurisdiction cannot be invoked on the basis of a defense or counterclaim." *Id.* at 54; *see Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Even setting aside the well-pleaded complaint rule, Landowners' suit would not "arise under" CERCLA for the simple reason that Landowners do not press CERCLA claims. A case generally "arises under federal law" only "when federal law *creates* the cause

of action asserted." *Gunn v. Minton*, 568 U.S. 251, 257 (2013) (emphasis added, quotation marks omitted).[5]

Because Landowners' claims do not meet these well-established requirements, they are outside Section 113(b)'s scope. Consistent with the "demands of [l]inguistic consistency" and the presumption that Congress legislates against the backdrop of the federal-question statute's longstanding interpretation, this Court has generally "interpreted the phrase 'arising under' * * * identically" when other statutes repeat it. *Gunn*, 568 U.S. at 257 (28 U.S.C. § 1338); *accord, e.g.*, *Dep't of Energy v. Ohio*, 503 U.S. 607, 625-26 (1992) (Clean Water Act); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 8 n.7 (1983) (28 U.S.C. § 1337); *but cf. Weinberger v. Salfi*, 422 U.S. 749, 760-61 (1975) (claims "arising under" Social Security Act encompassed constitutional claims for Social Security benefits where Congress clearly intended to channel them through administrative-exhaustion process). That Section 113(b) concurrently deprives state courts of jurisdiction provides all the more reason not to stretch its use of "arising under" beyond this

[5] Neither ARCO nor the government contends this case fits the "special and small category" of cases where federal-question jurisdiction lies over state-law claims (assuming the well-pleaded complaint rule is satisfied). *Gunn*, 568 U.S. at 258. It would not (and ARCO never attempted removal on that ground): no federal issue is "necessarily raised" because no element of Landowners' claims turns on federal law, *ibid.*; any federal issue is insubstantial because Landowners' claims are "fact-bound and situation-specific," *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 681 (2006); and exercising jurisdiction would sweep "garden variety state tort law" cases into federal courts, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318 (2005).

settled understanding. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (adhering to "deeply rooted presumption in favor of concurrent state court jurisdiction").

ARCO scrambles to locate some indication that Section 113(b) employs the phrase "arising under" to mean something novel. It comes up empty. ARCO relies almost entirely on the conclusory assertion that "'Congress used language more expansive than would be necessary if it intended to limit exclusive jurisdiction [under § 113(b)] solely to those claims created by CERCLA.'" Br. 27 (quoting *Fort Ord*, 189 F.3d at 832). ARCO never identifies exactly what this "more expansive" language is. It would be hard-pressed to do so: Congress used precisely the "arising under" phrasing one would expect it to use to limit Section 113(b) to claims created by CERLCA. After all, the "most familiar definition of the statutory 'arising under' limitation is Justice Holmes' statement, 'A suit arises under the law that creates the cause of action.'" *Franchise Tax Bd.*, 463 U.S. at 8-9.[6]

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[6] While Section 113(b) refers to "controversies" arising under CERCLA and the federal-question statute refers to "civil actions," 28 U.S.C. § 1331, ARCO does not contend this distinction makes any difference. For good reason: both terms refer to judicial proceedings. *Compare Black's Law Dictionary* 35 (10th ed. 2014) (defining "action" as "[a] civil or criminal judicial proceeding"); *with id.* at 404 (defining "controversy" as "[a] justiciable dispute"). And this Court has interpreted the phrase "arising under" consistently even when it does not modify the specific term "civil action." *See Franchise Tax Bd.*, 463 U.S. at 8 n.7 (addressing 28 U.S.C. § 1337, which governs "any civil action or proceeding arising under" federal law regulating commerce); *Dep't of Energy*, 503 U.S. at 631 ("civil penalties arising under").

The government's variation on this argument is slightly more nuanced but no less wrong. The government focuses on the opening clause of Section 113(b)'s grant of exclusive federal jurisdiction over controversies "arising under" CERCLA: "Except as provided in subsection (a) and (h) of this section." Emphasizing this cross-reference to subsection (h), the government contends "every 'challenge[ ]' to an EPA response action under Section 113(h) is necessarily a 'controvers[y] arising under' CERCLA for purposes of Section 113(b)" and thus cannot be brought in state court. SG Br. 25. It reasons that Section 113(h) is an exception to Section 113(b) and an "exception must by definition be narrower than the corresponding rule." SG Br. 25.

The government's premise is wrong. An exception need not be "narrower than the corresponding rule"—at least not in the sense the government contends. The word "except" does not transform every Venn Diagram into a set of concentric circles. Rather, an exception "derogates from the provision to which it refers," rendering the rule inapplicable where the exception's requirements are met. *Merit Mgmt. Grp. v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (quotation marks omitted). Take the following variation on Section 113(b): "Except as provided in the Eleventh Amendment, the federal district courts shall have exclusive original jurisdiction over all controversies arising under CERCLA." *Cf.* 42 U.S.C. § 9659(a)(1). This provision would not mean that all claims barred by the Eleventh Amendment are necessarily "controversies arising under CERCLA," but instead that the

Eleventh Amendment supersedes the grant of subject-matter jurisdiction when the Amendment *also* applies.

Likewise, Congress clarified in Section 113(b) that Section 113(h)'s elimination of federal-court jurisdiction over specified "challenges" supersedes Section 113(b)'s general grant of federal-court jurisdiction when both provisions otherwise apply. Nothing in this familiar structure suggests Congress further intended to establish that *all* Section 113(h) "challenges" are also Section 113(b) "controversies arising under" CERCLA. *See Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1070 (2018) ("Thousands of statutory provisions use the phrase 'except as provided in * * * ' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict.").

b. In any event, even if ARCO and the government were right that Section 113(b) gave federal courts exclusive jurisdiction over all Section 113(h)-prohibited "challenges," it would not apply here. Again, Section 113(h) itself precludes only *federal-law* claims. 42 U.S.C. § 9613(h) (expressly allowing "challenge" within federal courts' diversity jurisdiction); *Village of DePue*, 537 F.3d at 784. Section 113(h)'s carve-out for state-law claims (which categorically are not barred as "challenges") thus dooms ARCO's reliance on Section 113(b) as well.

The statutory text also disposes of ARCO's policy arguments. Most prominently, ARCO insists "[i]t would

be perverse to permit litigants to file in state courts exactly the same claims that federal courts cannot hear." Br. 31. But federal courts *can* hear such state-law claims if the requirements for diversity jurisdiction are satisfied. 42 U.S.C. § 9613(h). It is ARCO's interpretation that would generate "perverse" results. Why would Congress strip state courts of jurisdiction over the very state-law tort claims it expressly allowed to proceed in federal court, or leave relief to turn on the fortuity of whether the complete-diversity requirement is satisfied?

3. The legislative history confirms what the statutory text dictates: Section 113 does not bar state-law actions in state court.

Section 113 achieved its current form in 1986, when Congress enacted the Superfund Amendments and Reauthorization Act (SARA). *See* SARA § 113(c)(2), Pub. L. No. 99-499, 100 Stat. 1613, 1650. The original House version of that bill contained a variation of Section 113(h) that provided: "No court shall have jurisdiction to review any challenges to removal or remedial action * * * ." H.R. 2005 § 113(h), 99th Cong. at 68 (1985). But Congress revised the provision to expressly limit it to "Federal" court and exempt diversity cases.

Congress' reasons for doing so are apparent. As the Conference Committee Report expressly stated: "New section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened

releases of hazardous substances, pollutants, or contaminants." H.R. Rep. No. 99-962, at 224 (1986) (Conf. Rep.). Senator Mitchell, one of the sponsors, explained the provision was revised to preserve actions "based on State nuisance law, or actions to abate the hazardous substance release itself, independent of Federal response action." 132 Cong. Rec. 33,554-55 (Oct. 17, 1986). Similarly, Senator Stafford, another sponsor and the provision's drafter, observed that "the fundamental purpose [of Section 113(h)] is to preserve rights under nuisance law as it is defined under the relevant State law." 132 Cong. Rec. 28,410 (Oct. 3, 1986).

These statements from the Conference Report and the bill's sponsors leave little doubt as to Congress' intent. *See Sturgeon v. Frost*, 139 S. Ct. 1066, 1085 (2019). Perhaps for this reason, ARCO never suggests the legislative history supports its far broader reading of Section 113.

The government attempts the argument, but the snippets of legislative history on which it relies provide no support. The government points to floor statements from Senator Thurmond and Representative Glickman. SG Br. 26. Such "[i]solated statements * * * are not impressive legislative history," particularly in comparison to the far "more authoritative" Conference Committee Report. *Garcia v. United States*, 469 U.S. 70, 76, 78 (1984) (quotation marks omitted). Even if considered, they shed little light here. That federal courts would, as Senator Thurmond stated, have "exclusive jurisdiction over all controversies under

CERCLA" (SG Br. 26) adds nothing to what Section 113(b) itself provides. To the extent these individual members of Congress suggested Section 113 might preclude state-law actions, the bill's sponsors refuted that interpretation. As Senator Mitchell explained, "the original text" of Section 113(h) (referring to "No court") might have "extinguish[ed] the jurisdiction of any court to review any challenge. Clearly, the conference substitute no longer does this." 132 Cong. Rec. 33,554 (Oct. 17, 1986). Similarly, Senator Stafford reiterated: "Section 113 of CERCLA governs only claims arising under the act. Whether or not a challenge to a clean up will lie under nuisance law is determined by that body of law, not section 113." 132 Cong. Rec. 33,475 (Oct. 17, 1986).

B. Landowners Do Not "Challenge" EPA's Orders

Even if Section 113(h) did somehow work through Section 113(b) to preclude state-law actions in state court, Landowners' claims could proceed. Because Landowners' restoration-damages request in no way depends on EPA's remedial orders being wrong, Landowners do not "challenge[]" those orders.

1. In the legal context, a "challenge" generally means "[a]n act or instance of formally questioning the legality or legal qualifications of a person, action, or thing." *Black's Law Dictionary* 278 (10th ed. 2014); *accord*, *e.g.*, *Black's Law Dictionary* 209 (5th ed. 1979)

("to question form[ally] the legality or legal qualifications of"). To "challenge[]" a "removal or remedial action under [42 U.S.C. § 9604]," as Section 113(h) provides, a plaintiff thus must contest the legality of the EPA-ordered remedy. 42 U.S.C. § 9613(h). In other words, a section 113(h) "challenge[]" is one calling for *judicial review* of EPA's actions.

The structure of Section 113(h) confirms this understanding, revealing Congress' specific concern with the "[t]iming of *review*" over EPA orders (as Section 113(h)'s heading states). *Ibid.* (emphasis added). Section 113(h) contains five enumerated exceptions, each of which relates to a specific type of CERCLA enforcement action at a particular time in the clean-up process. *See City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865, 870-72 (9th Cir. 2009). The fourth exception, for example, permits CERCLA citizen suits "alleging that the removal or remedial action taken * * * was in violation of any requirement" of CERCLA, but only once no further remedial action "is to be undertaken at the site." 42 U.S.C. § 9613(h)(4). Through its prohibition on "challenges" and its enumerated exceptions, Section 113(h) channels suits questioning the legality of EPA's selected remedy to specified times, generally postponing the "presumptive right of judicial review" until "completion of the remedial action." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245 (7th Cir. 1991).

Section 113(h) is thus a prohibition on premature review of EPA actions under CERCLA. Topol & Snow, Superfund Law and Procedure § 2.5, 108 (1992) ("In short, Section 113(h) bars judicial review of an EPA

removal or remedial action until the Agency has taken some enforcement action related thereto."). Congress believed litigation regarding EPA's orders while remediation was underway had "the effect of slowing down or preventing the EPA's cleanup activities." *United States v. Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993) (emphasis omitted) (quoting H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985)). Together with Section 113(j)—which establishes the standard of review for the proceedings Section 113(h) permits, 42 U.S.C. § 9613(j)—Section 113(h) thus sets forth comprehensive procedures for judicial review of EPA's actions.

2. Because Landowners' claims do not depend on the invalidity of any EPA action, Landowners do not advance a Section 113(h) "challenge." Landowners press no claim that EPA's "decision in selecting the response actions" was "arbitrary and capricious or otherwise not in accordance with law." 42 U.S.C. § 9613(j)(2). They need not contest EPA's determination that its residential soil remedy, J.A. 94, was "protective of human health and the environment" under CERCLA. 42 U.S.C. § 9621(b)(1). Nor need they dispute EPA's conclusions that removal of "pasture" soil, or construction of an underground trench, would not meet CERCLA's standard of cost-effectiveness. J.A. 157-58; Water, Waste and Soils ROD § 7.1; *see* 42 U.S.C. § 9621(d)(4)(C).[7] Far from seeking review of EPA's

[7] While ARCO and the government repeatedly invoke EPA's supposed determination that Landowners' proposed remedies could have environmental consequences (Br. 29, SG Br. 21), they

orders here, Landowners successfully moved to exclude them as irrelevant. Landowners' App. 26:9.

Simply put, the federal-law propriety of EPA's remediation efforts—which have been completed on Landowners' property, Pet. App. 47a—has no bearing on whether Landowners can prevail under *Montana* law, which sets a different standard. Montana "common law seeks to restore a party to the condition that existed before the injury." *Sunburst*, 165 P.3d at 1095. That ARCO was subject to CERCLA-mandated remedial orders affects neither ARCO's Montana-law liability for polluting Landowners' land nor the availability of Montana-law damages to restore it. *Id.* at 1095-96.

3. ARCO and the government argue that Section 113(h) precludes not just legal "challenges *to* removal or remedial action" EPA selects under CERCLA, 42 U.S.C. § 9613(h) (emphasis added), but also any legal claim that involves a cleanup *different* from the one EPA selects. *See* Br. 29; SG Br. 20-22. That is not what Section 113(h) provides. Had Congress intended Section 113(h) to preclude any additional, non-CERCLA remediation, it would have said so expressly.

Indeed, aside from cursory references to dictionary definitions of "challenge," neither ARCO nor the government attempts to ground its broad reading in CERCLA's text, structure, or legislative history. Instead, they rely entirely on various lower-court

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cite only the government's amicus brief below (which in turn cited nothing). Pet. App. 72a-74a; *see infra* pp. 56-58.

decisions. Br. 28; SG Br. 17-18. These opinions do little to advance the argument. While they articulate varying formulations of what constitutes a Section 113(h) "challenge," *none* deems a claim a "challenge[]" where it is not premised on the invalidity of an EPA remedial action.[8]

Here, by contrast, Landowners can be right without proving EPA wrong. Because their claims do not call for review of the agency's orders, Section 113(h) has no application.

III. SECTION 122(e)(6) DOES NOT BAR LANDOWNERS' RESTORATION DAMAGES

ARCO next relies on Section 122(e)(6), which requires "potentially responsible part[ies]" to secure EPA authorization before conducting "remedial action[s]." 42 U.S.C. § 9622(e)(6). Contrary to ARCO's contentions, this provision does not forever prevent all property

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[8] *See ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1115 (9th Cir. 2000) (claim was not a challenge); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991) (suit against EPA challenging its ability to conduct CERCLA remediation study); *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990) (claim against EPA challenging "the procedure employed in selecting a remedy"); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) (claim premised on contention EPA was "'not applying the 'proper remediation standard[s]'"); *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002) (suit against EPA to "alter the remedial plan"); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 881 (D.C. Cir. 2014) (suit against federal government to enforce standards that would alter EPA remedial plan); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330-31 (9th Cir. 1995) (same).

owners at Superfund sites from removing the hazardous wastes others left on their land.

A. Landowners Are Not Potentially Responsible Parties

1. The parties appear to agree on the plain meaning of the phrase "potentially responsible party." As ARCO puts it, "'PRP' starts with a 'P' because [it] covers everyone who is *potentially* responsible for hazardous-waste contamination, not just parties actually deemed liable for cleanup costs or remediation." Br. 36 (quotation marks omitted). Exactly right: a "potentially responsible party" is a party who might *potentially* be liable under CERCLA. *E.g.*, *American Heritage Dictionary* 1025 (1981) ("potential": "possible but not yet realized; capable of being but not yet in existence").

The parties also appear to agree Landowners themselves cannot be liable for any of the hazardous waste ARCO put on their properties. As the Montana Supreme Court held, the relevant statute of limitations has long passed. Pet. App. 16a; *see* 42 U.S.C. § 9613(g)(2)(B). ARCO does not and could not dispute that conclusion. Br. 38.

The parties' agreement on those issues should resolve the dispute. A "potentially responsible party" is a party who faces some possibility of CERCLA liability, yet there is no such "potential[]" here. How could Landowners be "potentially responsible parties"?

ARCO's answer is that, notwithstanding the plain meaning of "potentially responsible," a "PRP is anyone who fits within § 107(a)'s broad definitions of 'covered persons'—full stop." Br. 36. But Section 107(a) defines the term "covered persons," not "potentially responsible party." And CERCLA nowhere defines "potentially responsible party" as a Section 107(a) "covered person." Rather, CERCLA consistently uses the phrase only to describe persons who could potentially be held liable. ARCO identifies no statutory basis for nevertheless treating "covered persons" and "potentially responsible parties" as identical.

2. ARCO's principal argument is that this Court has already decided that "potentially responsible party" and "covered person" are the same. Br. 32-33. We acknowledge this Court has used language that equates the two.[9] For example, in *United States v. Atlantic Research Corp.*, this Court stated: "Section 107(a) defines four categories of PRPs." 551 U.S. 128, 131-32 (2007); *accord Burlington*, 556 U.S. at 608-09; *Cooper*, 543 U.S. at 160; *but see* Br. 32 ("CERCLA does not define 'potentially responsible parties' "); SG Br. 33 (same).

Upon closer examination, these authorities do not decide the statutory construction question here. This Court has never actually *interpreted* CERCLA's use of

[9] The government's halfhearted endorsement of ARCO's position begins and ends with these prior decisions, which it says have "treated"—note the careful language—"potentially responsible part[ies]" as "corresponding to the 'covered persons' identified in CERCLA Section 107(a)." SG Br. 33.

the phrase "potentially responsible party." Indeed, the Court has never even addressed a CERCLA provision containing that phrase. Instead, this Court has used "PRP" as short-hand to describe Section 107(a) "covered persons" because the parties before it have done so. *E.g.*, Petitioner's Brief, *Cooper*, 543 U.S. 157, 2004 WL 341586, at *9 (Section 107(a) "'covered persons'" are "'referred to as potentially responsible parties' ('PRPs')").

Litigants' use of this acronym is understandable because the two concepts are obviously related. Section 107(a) defines who may be liable under CERCLA, and thus all "potentially responsible parties" must fall within Section 107(a). But in no prior case did the litigants (let alone this Court) have reason to consider the converse—whether all Section 107(a) "covered persons" are "potentially responsible parties." That is because no prior case turned on the meaning of "potentially responsible party."

This Court's decision in *Atlantic Research*—on which ARCO relies, Br. 36—is illustrative. There, this Court confronted Section 107(a)(4)(B), which provides that "covered persons" identified in Section 107(a)(1)-(4) are liable for "any other necessary costs of response incurred by any other person." 551 U.S. at 135. The question presented was whether "other person" meant persons other than those in Section 107(a)(1)-(4), or persons other than "the United States, a State, or an Indian tribe," which were listed in the immediately preceding subsection. *Ibid*. This Court adopted the latter reading. *Ibid*. It reasoned, in part, that "other

person" could not mean persons other than those identified in Section 107(a)(1)-(4) because Section 107(a)(1)-(4) was sufficiently broad to "sweep in virtually all persons likely to incur cleanup costs." *Id*. at 136. Though this Court used the phrase "PRP" in explaining that conclusion, nothing turned on that acronym's meaning: the Court could have replaced every reference to "PRP" with "Section 107(a) covered person" without changing its holding or reasoning one bit. *Ibid*. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper*, 543 U.S. at 170.

3. The proper interpretation of "potentially responsible party" is thus an issue this Court has yet to confront. Consistent with its plain meaning, the phrase should be understood to encompass only parties who face some risk of CERCLA liability.

Had Congress intended "potentially responsible parties" to mean Section 107(a) "covered persons," it would have said "Section 107(a) covered persons." Congress did just that elsewhere in CERCLA, referring to "any person covered by the provisions of paragraph (1), (2), (3), or (4) of section [107](a)." 42 U.S.C. § 9619(d); *accord id.* § 9624(b)(2). When Congress instead used the different phrase "potentially responsible party," it presumably meant something different. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Context reinforces that inference. "Potentially responsible party" makes the vast majority of its

appearances in Section 122, which governs settlements. All told, 33 of CERCLA's 54 uses of the phrase are contained in Section 122. The bulk of CERCLA's remaining uses of the phrase either directly cross-reference Section 122, *e.g.*, 42 U.S.C. § 9620(e)(6) ("Settlements with other parties"), or otherwise refer to settlement negotiations, *e.g.*, *id.* § 9621(f)(1) (EPA "shall provide notice to the State of negotiations with potentially responsible parties").

A "potentially responsible party" is thus a covered person who faces potential liability and therefore might settle. The phrase is an apt descriptor for such parties: litigants settle to eliminate some existing risk (*i.e.*, "potential[]") of liability. Parties that face no risk of liability, by contrast, would not engage in the negotiations Section 122 contemplates—they have no need to settle their "liability to the United States" by securing a "covenant not to sue." *Id.* § 9622(c)(1).

4. The scope of Section 122(e)(6) becomes clear when understood in this settlement context. Section 122(e) ensures all "potentially responsible part[ies]" are apprised of any ongoing settlement negotiations and not unfairly surprised by the remediation costs they are forced to bear. It includes requirements that the federal government provide each potentially responsible party with a list of all other potentially responsible parties and specifies procedures for proposals and counter-proposals. *Id.* § 9622(e)(1)-(3). Subsection (e)(6)'s bar on "potentially responsible parties" taking unauthorized remedial action furthers Section 122(e)'s purpose by ensuring EPA retains control over the response

costs with which settlement negotiations are concerned: no party can unilaterally incur CERCLA response costs that might be foisted on other negotiating parties.

Under ARCO's interpretation of "potentially responsible party," however, Section 122(e)(6) would have far more radical effects. If Section 122(e)(6) applies to any party listed in Section 107(a), then it *forever* prevents anyone whose property has been contaminated from taking any steps to clean their property without EPA approval. EPA would, in effect, be granted an easement allowing it to compel residential landowners to forever store the arsenic, lead, and other toxic materials polluters have dumped on their lawns, gardens, and homes. That is the very premise of ARCO's argument here—ARCO insists Landowners can never disturb even a "cubic foot" of soil in their own backyards without EPA's say-so. MSJ Hearing Tr. 83-84 (June 20, 2016); *see* Br. 37 (claiming it would "warp the overall statutory design" if EPA lacked this extraordinary power).

Such federal destruction of private property rights cannot be reconciled with CERCLA's text. Had Congress intended to take the unprecedented step of granting EPA perpetual veto power over private property owners' efforts to clean their own land within a vast Superfund site, it would have spoken more clearly. For example, it might have imposed Section 122(e)(6)'s restrictions on all "persons," rather than all "potentially responsible parties." It also would have located this extraordinary power in a less obscure corner of

CERCLA. "[I]t seems highly suspect that Congress intended this provision which is buried within a subsection entitled 'notice provisions' in a section addressing settlements with private responsible parties" to vest EPA with this expansive authority over the property rights of thousands of residential landowners. *Colorado*, 990 F.2d at 1583. "Congress does not hide elephants in mouseholes." *Cyan*, 138 S. Ct. at 1071 (quotation marks omitted).

That is to say nothing of the constitutional concerns ARCO's reading raises. Forcing innocent residential landowners to forever house pollutants another party put on their land is the sort of "permanent physical occupation of an owner's property authorized by government [that] constitutes a 'taking.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); *see id.* at 427 ("where real estate is actually invaded by superinduced additions of water, earth, sand, or other material * * * so as to effectually destroy or impair its usefulness, it is a taking"). And granting EPA the power to regulate each shovelful of dirt homeowners dig in their own lawns would test the far reaches of Congress' power under the Commerce Clause. *See Gonzalez v. Raich*, 545 U.S. 1, 57-59 (2005) (Thomas, J., dissenting). Where an interpretation of a statute "would raise serious constitutional problems, the Court will construe the statute to avoid such problems" absent some indication Congress clearly intended that result. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). There is none here.

5. CERCLA's legislative history reinforces the plain-language reading of "potentially responsible party." As originally enacted, CERCLA did not use this phrase. Instead, the phrase arose between CERCLA's 1980 enactment and the 1986 passage of SARA. During this period, EPA used the "PRP" acronym to refer to the parties with which it negotiated and that would be responsible for cleanup. *E.g.*, EPA, Highlands Acid Pit Record of Decision 18 (Jan. 24, 1984) (only "one potentially responsible party" had been identified at acid pit that leaked into local waterways, and this person "d[id] not have the financial assets to pay for the cleanup"). That usage was reflected in the version of SARA that passed the House, which expressly defined "potentially responsible party" to mean "a person *against whom an action could be brought* under section 106 with respect to [a] release or a person *who would be liable* under section 107 if response costs were incurred." H.R. 2005 § 122(k), 99th Cong., at 182 (1985) (emphasis added). Congress later dropped any definition of "potentially responsible party," likely because it was viewed as unnecessary. There is no indication Congress intended to deviate from the plain meaning of "potentially responsible party" as encompassing only persons who face potential CERCLA liability.

6. ARCO's remaining arguments are unavailing. Textually, ARCO focuses on two provisions of Section 122 (which, again, is titled "Settlements"). Br. 33. The first, Section 122(a), authorizes EPA to enter "into an agreement with any person (including the owner or operator of the facility *from which a release*

or substantial threat of release emanates, or any other potentially responsible person) to perform a response action." 42 U.S.C. § 9622(a) (emphasis added). By its terms, this provision has no application to Landowners, who are not the *source* of any pollution. Regardless, this language simply reflects Congress' understandable presumption that polluters would face CERCLA liability; again, EPA would not settle with individuals who cannot be liable.

The second provision is Section 122(e)(1)(A), which requires that when EPA enters negotiations with a potentially responsible party, it must provide all such parties with "the names and addresses of potentially responsible parties (including owners and operators and other persons referred to in section 107(a))." 42 U.S.C. § 9622(e)(1)(A). This provision indicates that the class of "potentially responsible parties" will *include* individuals liable under Section 107(a); it does not establish that *all* individuals identified in Section 107(a) are necessarily "potentially responsible parties."

EPA's conduct in this case confirms the inapplicability of Section 122(e)(1)(A) to Landowners. EPA has engaged in substantial settlement negotiations with ARCO. *See* Press Release, EPA, EPA and Parties Reach Conceptual Settlement Framework for Final Cleanup Actions at Anaconda Smelter Superfund Site in Montana (July 30, 2018). But EPA does not claim it ever included Landowners on the Section 122(e)(1)(A)-mandated list. Nor does it claim it ever served them with notice of those negotiations, as Section 122(e)(1)(A)

requires. Indeed, until this case reached the steps of this Court (and the record was closed), *see* Br. App. 1a, EPA never treated Landowners as potentially responsible parties. *But see* 42 U.S.C. § 9613(k)(2)(D) (requiring EPA "to identify and notify potentially responsible parties as early as possible before selection of a response action"). Instead, it identified ARCO alone as "*the* Potentially Responsible Party (PRP) for this site." J.A. 64 (emphasis added).

ARCO also invokes a parade of horribles—all of which are either not horrible or readily avoided. ARCO asserts, for example, that "if parties must have entered into voluntary settlements or have been subjected to judicial determinations of liability" to qualify as "potentially responsible parties," the procedural protections the statute affords potentially responsible parties would lose meaning. Br. 37. That is not Landowners' position. The question is whether a party is *potentially* (not actually) liable. Many parties at Superfund sites will face some risk of liability long before final judgment. But if their potential for liability is eliminated—whether through judicial determinations or the passage of time—they are no longer "potentially responsible parties."

ARCO worries that if passage of CERCLA's statute of limitations means a "party" is no longer "potentially responsible," then EPA will be unable to exercise direct authority over that party unless EPA brings suit within six years after commencing a cleanup. Br. 38-39. That is how limitations periods work; they encourage "diligent prosecution of known claims" and allow

parties ultimately to "put past events behind" them. *CTS*, 573 U.S. at 8-9; *see* 42 U.S.C. § 9613(k)(2)(D). ARCO's contention that Congress would not have "hid[den]" these straightforward consequences of a statute of limitations within CERCLA's statute of limitations presupposes that "potentially responsible party" status is both unrelated to potential liability and everlasting. Br. 38. ARCO cites no statutory basis for these assumptions—which would conflict with the plain meaning of "potentially responsible party," ignore the context in which CERCLA uses the phrase, and raise serious constitutional concerns. *Supra* pp. 36-37, 39-43.

But this does not mean EPA is left powerless to protect "the community as a whole from environmental threats." *Contra* Br. 39. If Landowners were to create "an imminent and substantial endangerment to the public health or welfare or the environment," CERCLA empowers EPA to seek equitable relief. 42 U.S.C. § 9606(a); *see* CVSG Br. 17 (CERCLA provides EPA ample "mechanisms" to address any remedial actions that would "undermine[]" EPA remedial plan). Landowners would also face liability if they were to somehow worsen the environmental harms ARCO caused. Nothing in the record suggests Landowners' contemplated restoration could have such adverse effects. *See supra* pp. 8-9, 13.

Finally, ARCO claims EPA has shared its reading of the statute for "nearly 30 years." Br. 34. That is untrue—as EPA's shifting positions in this case reveal. *Supra* pp. 12-13. In the guidance document on which ARCO relies, EPA announced it would exercise its

enforcement discretion not to impose liability on residential landowners. EPA, Policy Towards Owners of Residential Property at Superfund Sites (1991). EPA did not say such individuals are forever "potentially responsible parties" under Section 122(e)(6) or any other provision. *Ibid*. This guidance was thus consistent with EPA's district-court brief here, which cautioned that Landowners may *not* be "potential responsible parties" given available "defenses to CERCLA liability." ARCO App. 555. EPA later changed its view of the statute (twice), arriving at its latest position in an informal letter to Landowners' counsel issued weeks before ARCO's certiorari petition. Br. App. 1a. And EPA did not sign the United States' brief in this case. *Cf.* United States' Amicus Brief, *County of Maui v. Hawaii Wildlife Fund*, No. 18-260 (U.S. May 16, 2019). Perhaps for these reasons, no one contends EPA's current reading (whatever it is) warrants any deference. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988).

B. Landowners Are Exempt As "Contiguous"

Even accepting ARCO's view that when Congress referred to "covered person" in Section 107(a) it actually meant "potentially responsible party," Landowners would not qualify. That is because, as reflected in the second of EPA's three positions (Pet. App. 79a), Section 107(q) provides that "contiguous" landowners "shall *not* be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of" Section 107(a). 42 U.S.C. § 9607(q) (emphasis added). In other words,

Section 107(q) is not just a defense to liability; it establishes that contiguous landowners are not Section 107(a) "owners and operators" at all. Thus, if Landowners are contiguous landowners, they are not Section 107(a) "covered persons," and they cannot be "potentially responsible parties" under any reading of CERCLA.

The contiguous-landowner exception fits Landowners to a T. It is designed for individuals who, through no fault of their own, suffer contamination from neighboring properties. Landowners own property that is "contiguous to or otherwise similarly situated with respect to" property they do not own and from which a "hazardous substance" was released. *Id.* § 9607(q)(1)(A). They did not "cause, contribute, or consent to the release" of that substance; they are not potentially liable through any relationship with the entity that *did* pollute their land (*i.e.*, ARCO); they have not allowed any further releases from their property; and they have complied with any land-use and notice obligations that might be imposed. *Id.* § 9607(q)(1)(A)(i)-(vii).

ARCO has previously suggested Landowners may not meet a final requirement of Section 107(q) because they should have known of ARCO's pollution when they purchased their properties. *See id.* § 9607(q)(1)(A)(viii). But for *residential* landowners, CERCLA requires only a basic title search and site inspection before purchase. *Id.* § 9601(35)(B)(v). And because ARCO raises Section 122(e)(6) as an affirmative defense, it must produce evidence that

Landowners either did not perform this search or affirmatively knew the extent of ARCO's pollution. *Anderson v. Stokes*, 163 P.3d 1273, 1280 (Mont. 2007). ARCO did not meet that burden—and it certainly produced nothing that would demonstrate that *all* of the many Landowners fall outside this exception. *See* ARCO App. 482 & n.2.[10]

C. Remand Would Be Required Regardless

Finally, even if Landowners were "potentially responsible parties," that would not defeat their restoration-damages request. Section 122(e)(6) cannot "bar[]" Landowners' proposed cleanup. Br. 22. If it applies, it requires Landowners to ensure EPA "authorize[s]" their plans. 42 U.S.C. § 9622(e)(6). EPA has never stated it would refuse such approval; to the contrary, counsel told the Montana Supreme Court that some version of Landowners' plan "might be something that EPA could authorize." MT Oral Arg. 41:34-48. There is thus a possibility of EPA approval. Whether that prospect is sufficient for Landowners to show they will use any damages to restore their properties, *see Sunburst*, 165 P.3d at 1089, is a complex, factbound question of state law. Thus, even if ARCO's interpretation of CERCLA is correct, this Court should remand for the Montana courts to address how

[10] Many of Landowners also qualify for the "bona fide prospective purchaser" exception, which exempts from Section 107(a)'s coverage owners who knew of the pollution if they purchased the property after 2002. 42 U.S.C. §§ 9607(r), 9601(40).

Landowners' status as "potentially responsible parties" affects their claims.

IV. THE RESTORATION-DAMAGES REMEDY IS NOT PREEMPTED

"CERCLA, it must be remembered, does not provide a complete remedial framework" or a "general cause of action for all harm caused by toxic contaminants." *CTS*, 573 U.S. at 18. Instead, the statute's *only* preemptive provision "leaves untouched States' judgments about causes of action" and "the scope of liability." *Ibid*. Nonetheless, ARCO contends CERCLA broadly preempts state-law remedies for quintessential state-law property torts like trespass and nuisance. Its arguments lack support in CERCLA's text or structure: the statute expressly authorizes state-law actions like Landowners'.

A. "Impossibility" Preemption Is Inapplicable

ARCO contends Landowners' restoration-damages request is preempted under the "impossibility" doctrine. Br. 41-47. "Impossibility preemption is a demanding defense." *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). The defendant must demonstrate "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). ARCO's claim that it meets this high standard reflects fundamental misunderstandings of both state and federal law.

1. Restoration damages impose no restoration duty

To determine whether "federal law forbids an action that state law requires," it is necessary to know what "duties" state law imposes. *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472, 486, 488 (2013). In general, "common-law liability is 'premised on the existence of a legal duty,' and a tort judgment therefore establishes that the defendant has violated a state-law obligation." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). ARCO's "impossibility" claim depends on its assertions that Landowners' restoration-damages request imposes a "state-law duty to restore [Landowners'] land to pristine, pre-smelter conditions." Br. 41.

ARCO is subject to no such "duty." Landowners do not bring a failure-to-restore tort claim. J.A. 45-51. Rather, they claim ARCO polluted their properties, thereby trespassing and creating a nuisance. ARCO violated any relevant state-law obligations when it took actions that obstructed Landowners' "exclusive possession" of their properties and were "injurious" to their use of their land. *See Martin v. Artis*, 290 P.3d 687, 689, 691 (Mont. 2012). Restoration damages are (as the name would suggest) simply a measure of the *damages* Landowners may secure if they prove ARCO breached its obligations not to trespass or create a nuisance. *Sunburst*, 165 P.3d at 1087; J.A. 54-55; *compare* Restatement (Second) Torts § 4 ("Duty"), *with id.* § 12A ("Damages.").

ARCO grounds its contrary claims in a misreading of *Sunburst*. There, the Montana Supreme Court recognized that restoration damages—derived from a Restatement provision governing "damages" (*id.* § 929)—may "compensate a plaintiff more effectively than diminution in value under certain circumstances." *Sunburst*, 165 P.3d at 1087. The court did not, as ARCO claims, hold that the "responsible party [must] restore the property to 'the condition [it] would have been [in] absent [the] contamination.'" Br. 43 (quoting *Sunburst*, 165 P.3d at 1086-87). Instead, it held that *plaintiffs* seeking such damages must demonstrate *they* will "repair the damaged property"—a rule designed to prevent plaintiffs from receiving more than needed to "compensate [them] fully." *Id.* at 1088-89. Any restoration requirement is thus imposed entirely on the property owners themselves. The availability of this remedy does not mean defendants like ARCO are under an obligation to *restore* property, only to avoid polluting it in the first place.

That ARCO might conceivably reduce an ultimate restoration-damages award by initiating its own remediation effort is beside the point. A party can always seek to mitigate the damage its tort has caused. *E.g.*, Restatement (Second) Torts § 920A. But Montana's restoration-damages remedy does not *require* ARCO to do so. And "[t]he proper inquiry calls for an examination of the elements of the common-law duty at issue; it does not call for speculation as to whether a jury verdict will prompt the [defendant] to take any particular action." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431,

445 (2005) (citation omitted). Were it otherwise, any number of additional state-law remedies would be preempted—including remedies ARCO expressly concedes are viable. Further remediation would raise property values and thus reduce any diminution-in-value damages. Yet "all agree that CERCLA poses no impediment to such [diminution-in-value] relief." Br. 5. There is no basis for treating a restoration-damages award differently.

For these reasons, this case is nothing like the "impossibility" decisions ARCO cites. Br. 41-43, 46-47. There, the question was whether federal law preempted claims that the defendants breached state-law duties to provide adequate drug warnings. *Wyeth*, 555 U.S. at 560; *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 610-11 (2011); *Bartlett*, 570 U.S. at 484; *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1675 (2019). This Court held that defendants' ability to disregard state-law warning requirements and pay damages does not save warnings claims from impossibility preemption because the defendants would still be "contraven[ing] the law"—state law requires adequate warnings, and damages are simply the "sanction" for violating that mandate. *Bartlett*, 570 U.S. at 491. If federal law prohibits those warnings, the defendant is subject to inconsistent legal obligations regardless of what the punishment for violating the state-law obligation is. *Ibid.*

Here, ARCO "contravene[d]" the law by polluting Landowners' property, and restoration damages are simply the "sanction" for that prior breach of duty. No

federal law required ARCO to deposit arsenic, lead, and other toxic metals on Landowners' yards or prohibits ARCO from paying money to Landowners to use in cleaning their land. ARCO is thus not subject to any conflicting obligations.

2. Federal law would permit ARCO's remediation

a. Although this Court need not address the issue, federal law would not prevent ARCO from restoring Landowners' properties in any event. ARCO would need to seek EPA's authorization. Br. 44-45. But ARCO presented no evidence EPA would *deny* that request, and "the possibility of impossibility [is] not enough." *Merck*, 139 S. Ct. at 1678 (quotation marks omitted).

ARCO contends any action is "impossible" if federal-agency approval is needed. Br. 42-43, 46-47. This Court has not adopted that categorical rule. Instead, in the duty-to-warn cases ARCO cites, this Court applied a context-specific analysis in distinguishing between brand-name and generic drug manufacturers. Brand-name manufacturers can change their warning labels based on new information, so compliance with state-law duties to strengthen warnings is "impossible" only if the defendant establishes the FDA would reject the change. *Wyeth*, 555 U.S. at 571; *see Merck*, 139 S. Ct. at 1676. But generic manufacturers must ensure their labels are precisely the same as those of brand-name manufacturers. *PLIVA*, 564 U.S. at 614.

Thus, generic manufacturers can change labels only if they ask the FDA for assistance, the FDA "decide[s] there [is] sufficient supporting information," the "FDA undert[akes] negotiations with the brand-name manufacturer," and "adequate label changes [are] decided on and implemented." *Id.* at 619. Viewing this winding, multi-step, and multi-actor path as the functional equivalent of convincing Congress to amend governing law, this Court has held that, for preemption purposes, federal law prohibits generic manufacturers from changing drug warnings. *Id.* at 621.

ARCO's path to compliance with its state-law obligation is far less daunting (assuming, *arguendo*, Montana law imposes a "restoration" duty). ARCO faces nothing like this "Mouse Trap game" to perform additional cleanup. *Id.* at 619. Further remediation would not require EPA's "special permission and assistance," only its consent. *Id.* at 623-24; *see* J.A. 127. Moreover, unlike in the failure-to-warn context, any delay in securing agency approval would not leave ARCO facing inconsistent legal obligations. Every moment a drug manufacturer awaits FDA assistance to change its label, it violates state law requiring that label's modification. *PLIVA*, 564 U.S. at 611-12. By contrast, ARCO could eliminate any ultimate restoration-damages award by conducting the cleanup at some point before a jury issued its verdict. Unless EPA would *never* permit ARCO to further remediate, it would not be "impossible" for ARCO to "compl[y] with both federal and state regulations." *Merck*, 139 S. Ct. at 1672 (quotation marks omitted).

b. ARCO made no effort below to demonstrate EPA would prohibit it from removing additional contamination from Landowners' properties (having now completed all EPA-ordered remediation there). *See Wyeth*, 555 U.S. at 571-72 (defendant has burden to offer "clear evidence" that agency "would not have approved"). Far from making the required evidentiary showing in the trial court, ARCO affirmatively *disclaimed* any attempt to do so, asserting conflict preemption was "irrelevant." J.A. 348. And EPA counsel later told the Montana Supreme Court that aspects of Landowners' contemplated cleanup "might be something that EPA could authorize." MT Oral Arg. 41:34-48.

ARCO offers no basis for disturbing the district court's conclusion that it failed to create a material dispute of fact. Pet. App. 54a. ARCO focuses on Landowners' proposal to install walls to clean their groundwater. Br. 45-46. EPA had considered a similar wall elsewhere, but decided it was "technically impracticable from an engineering perspective." J.A. 158. That, in CERCLA-speak, means the remedy would be difficult and expensive—not that it would cause environmental harm. *See* EPA, Summary of Technical Impracticability Waivers at National Priorities List Sites (2012); *compare* 42 U.S.C. § 9621(d)(4)(C) (allowing EPA to waive compliance with standard that would be "technically impracticable from an engineering perspective"), *with id.* § 9621(d)(4)(B) (allowing waiver where compliance would "result in greater risk to human health and the environment"). EPA did not

determine such a wall *could not* be installed, only that EPA would not require ARCO to do so. *See Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323, 335 (2011) ("the fact that DOT made a negative judgment about cost-effectiveness * * * cannot by itself show that DOT sought to forbid common-law tort suits in which a judge or jury might reach a different conclusion").[11]

ARCO's assertion that "EPA wants this groundwater undisturbed and unadulterated" is thus unsupported by any actual EPA order. Br. 46. For that proposition, ARCO relies entirely on EPA's Montana Supreme Court amicus brief. Yet in Montana, as elsewhere, summary judgment requires actual evidence, not just attorney argument. *Garza v. Forquest Ventures, Inc.*, 358 P.3d 189, 193 (Mont. 2015). And EPA's amicus brief cited no factual support for its statements that Landowners' proposal "may" pose risks and "could" have detrimental effects. Pet. App. 73a-74a. As counsel clarified at oral argument, EPA simply was not sure: it had not considered the specific walls Landowners proposed or "had an opportunity" to fully evaluate their plan. MT Oral Arg. 31:40-32:00, 38:08-15.

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[11] Perhaps for this reason, ARCO does not contend Landowners' restoration-damages request is preempted as an "obstacle to the accomplishment and execution" of any of these EPA remedial orders themselves. *Cf. Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000). Similarly, while ARCO observes that restoring all of Landowners' properties would involve work on the (limited) areas ARCO has already remediated in addition to the (vast) areas it has not (*e.g.*, Br. 18), the point appears to be more rhetorical than legal: ARCO never suggests EPA would *preclude* such additional remediation (Br. 45-46).

Nothing in the record demonstrates EPA would forbid ARCO from performing (or, more accurately, paying for) this aspect of Landowners' remediation plan.

Similarly, ARCO insists EPA refused to let it further remediate any "pasture lands" (again, a term of art for large residential yards). Br. 45. Contrary to ARCO's repeated assertions, EPA's remedial orders never found that soil removal "might cause greater harm." Br. 14. EPA simply deemed it "cost prohibitive" for ARCO to remove all of its contamination. Water, Waste and Soils ROD § 7.1.

The only evidence ARCO cites for EPA's purported *prohibition* of that remedy is a letter from ARCO's own attorney. ARCO Supp. App. 182. The letter briefly references "discussions between Atlantic Richfield and EPA" in which EPA supposedly "indicated that it would not approve the proposed 'pasture' area cleanup work." *Ibid*. But the remedy ARCO had proposed involved *tilling* the soil, not removing it. Expert Report of David Folkes 2 (June 19, 2013). Landowners themselves oppose tilling as potentially harmful. Supplemental Expert Disclosure of David Coles, Ex. B, at 2-3 (July 16, 2018). Tellingly, neither the government's brief to this Court nor EPA's brief to the Montana Supreme Court makes any reference to an EPA prohibition on pasture-land soil removal.

B. Landowners' Restoration-Damages Request Is No "Obstacle" To CERCLA's Purpose

ARCO also contends suits like Landowners' "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Br. 47 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). But Congress made its "purposes and objectives" clear in CERCLA's text, and Landowners' request for restoration damages is no obstacle to them.

1. "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Like other questions of statutory interpretation, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993). And "[i]n areas of traditional state regulation" such as this, the Court "assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." *Bates*, 544 U.S. at 449 (quotation marks omitted).

Neither ARCO nor the government identifies any "clear and manifest" indication of Congress' intent to *preclude* state-law tort claims holding polluters liable for the costs of redressing their pollution. Congress authorized EPA to address the same problem and impose liability on those responsible. Br. 48-49 (citing

42 U.S.C. § 9621(a)); SG Br. 28 (citing EPA's authority to implement remedial plans). But "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989).

The case for "obstacle" preemption thus depends on the contention that "CERCLA sets both a floor and ceiling for remediation." Br. 50. According to ARCO and the government, CERCLA does not just authorize EPA-led cleanup efforts, it contemplates those efforts will be "*exclusive*." SG Br. 28 (emphasis added). As this Court said of the same contention directed at a similar statutory scheme, "[t]he most glaring problem with this argument is that all evidence of Congress' purpose is to the contrary." *Wyeth*, 555 U.S. at 574. "Congress did not intend for CERCLA to occupy the field or to prevent the states from enacting laws to supplement federal measures relating to the cleanup of hazardous wastes." *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 126 (3d Cir. 1991) (Alito, J.); *accord, e.g.*, *New Mexico*, 467 F.3d at 1246 ("CERCLA sets a floor, not a ceiling.").

The primary statutory provisions ARCO cites for CERCLA's supposed "floor and ceiling" mandate are, once again, Sections 113(h) and 122(e)(6). Br. 48-50. The government cites only Section 113(h) (coupled with general provisions outlining how EPA implements remedial plans). SG Br. 28-30. The "obstacle" preemption argument thus largely rises or falls on the validity of ARCO's interpretation of those two provisions.

Fall it does. Section 122(e)(6) preserves the status quo in settlement negotiations by requiring potentially responsible parties to seek EPA authorization for remedial actions; it does not grant EPA exclusive authority to forever dictate all land-use decisions at every property in Superfund sites. *Supra* pp. 36-49. Even if Section 122(e)(6) applied to persons like Landowners, it would simply require them to seek EPA approval for restoration work, not preclude any additional cleanup. *Supra* pp. 49-50. For its part, Section 113(h) channels judicial review of EPA's remedial orders to particular points in the remediation process; it does nothing to preclude additional cleanup efforts. *Supra* pp. 31-33. If anything, Section 113(h) demonstrates Congress' intent to do the opposite: by limiting Section 113(h) to federal courts and exempting diversity actions, Congress ensured CERCLA would not "affect in any way the rights of persons to bring nuisance actions under State law." H.R. Rep. No. 99-962, at 224.[12]

2. Other CERCLA provisions confirm Congress had no intention of precluding state-law cleanup efforts. In particular, Section 114(b) reduces the amount a person can recover under state law for

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[12] Confusingly, ARCO also invokes Section 121(d), which directs EPA to apply "any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard," subject to exceptions. 42 U.S.C. § 9621(d)(2)(A)(ii), (d)(4); *see* Br. 55. As ARCO cannot dispute, tort claims like Landowners' involve no such regulations. SG Br. 29-30 n.4; 40 C.F.R. 300.400(g). Regardless, that EPA can sometimes elect not to apply state regulations does not suggest EPA's cleanup precludes all other efforts.

"removal costs" by the "compensation for removal costs or damages or claims" that person secured under CERCLA. 42 U.S.C. § 9614(b). As then-Judge Alito noted, "if CERCLA's remedies preempted state remedies for recovering costs of hazardous waste cleanups, § 114(b) would make no sense at all." *Manor Care*, 950 F.2d at 127.

Likewise, CERCLA's sole express preemption provision, Section 309, expands rather than restricts state-law tort actions—including actions for property damage—by extending the statute of limitations. 42 U.S.C. § 9658(a)(1). As this Court has held of CERCLA specifically, "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts." *CTS*, 573 U.S. at 18 (quotation marks omitted).

3. CERCLA's many anti-preemption provisions remove all doubt: "CERCLA expressly does not preempt State law." *Manor Care*, 950 F.2d at 125; *see Williamson*, 562 U.S. at 339 (Thomas, J., concurring in the judgment) (savings clause "speaks directly to this question and answers it"). The language of these provisions is worth repeating given its clarity.

- Section 114(a): "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." 42 U.S.C. § 9614(a).

- Section 302(d): "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." *Id.* § 9652(d).
- Section 310(h): "This [Act] 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)] or as otherwise provided in [Section 309] (relating to actions under State law)." *Id.* § 9659(h).

ARCO cannot evade this plain language. ARCO claims Section 114(a) does not authorize "conflicting" liability. Br. 54. But a state-law claim for additional cleanup costs imposes no "conflicting" liability; it imposes "additional liability"—just as Section 114(a) allows. 42 U.S.C. § 9614(a). Similarly, ARCO argues Section 302(d) does not "permit state laws that overrule EPA's remediation plan." Br. 55. But if, as ARCO asserts, EPA's remedial orders exempt polluters from further cleanup liability, then CERCLA would "modify * * * the obligations or liabilities" of those polluters, just as Section 302(d) prohibits. 42 U.S.C. § 9652(d).

ARCO never attempts to address Section 310(h), which spells out precisely which CERCLA provisions limit suits: Section 113(h) (for federal claims) and Section 309 (for state claims). *Id.* § 9659(h). Consistent with "the familiar principle of *expressio unius est exclusio alterius*," Section 310's express delineation of

CERCLA's "pre-emptive reach" demonstrates "matters beyond that reach are not pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

ARCO's principal argument is that this Court should ignore these provisions. Br. 51-53; *see* SG Br. 31-32. Yet the goal of preemption analysis is to discern Congress' intent, and such clauses reveal that "Congress took care to preserve state law." *Wyeth*, 555 U.S. at 567; *accord, e.g.*, *Williamson*, 562 U.S. at 335; *see generally Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality opinion) (preemption inquiry governed by "traditional tools of statutory interpretation"). True, this Court has not held *every* state-law action salvaged by provisions generally disclaiming preemptive intent. *See Geier*, 529 U.S. at 870. But in carving out exceptions, this Court has merely adhered to the canon that the specific controls the general. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). Thus, for example, the Communications Act's general allowance for common-law remedies could not permit tort plaintiffs to obtain preferences from common carriers, as the Act specifically forbids common carriers from discriminating among customers. *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222, 227-28 (1998). Here, by contrast, ARCO can identity no statutory provision—whether specific or general—that could supersede Congress' codification of its intent to preserve state-law actions like Landowners'.

4. None of ARCO's remaining arguments justifies disregarding CERCLA's text. "Invoking some brooding federal interest or appealing to a judicial

policy preference should never be enough to win preemption of a state law." *Virginia Uranium*, 139 S. Ct. at 1901 (plurality opinion). "Brooding" is the perfect word for the supposed "purposes and objectives" ARCO invokes.

ARCO is aghast that juries might determine the extent of polluters' liability. Br. 49; *see* SG Br. 29. One could imagine a statutory scheme granting an expert agency like EPA exclusive authority to conduct hazardous-waste cleanups. Yet that is not the scheme Congress adopted. Juries have long been a central feature of our legal system, and CERCLA preserves their role. *E.g.*, 42 U.S.C. § 9614(a).

Similarly, ARCO contends state-law cleanup claims will affect settlement negotiations between EPA and polluting companies, as the settlement will not "fix [their] obligations." Br. 50. But such settlements cannot fix polluters' liability regardless: even ARCO acknowledges CERCLA does not preempt *all* state-law claims. Br. 50. ARCO cites nothing in CERCLA even hinting Congress intended to facilitate settlement by precluding the specific subset of state-law remedies at issue here.

The same goes for ARCO's contention that allowing claims like Landowners' will create environmental risks. Br. 49-50. Congress addressed that concern by allowing EPA to bring actions to prevent an "imminent and substantial endangerment to the public health or welfare or the environment." 42 U.S.C. § 9606(a). Congress nowhere took the further step of forbidding all

state-law actions that contemplate additional hazardous-waste remediation. And it is the statute Congress enacted, not the one ARCO wishes it had, that controls. *Virginia Uranium*, 139 S. Ct. at 1901 (plurality opinion).

CONCLUSION

The writ of certiorari should be dismissed. If it is not, the judgment should be affirmed.

Respectfully submitted,

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OCTOBER 15, 2019

APPENDIX

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APPENDIX

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

State courts; certiorari

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

* * * * *

2. 28 U.S.C. 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

3. 28 U.S.C. 1332(a) provides:

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

4. 42 U.S.C. 9601(9), 20(A), (23), (24), (25), (35), (40) (CERCLA Section 101) provide in pertinent part:

Definitions

For purpose of this subchapter—

* * * * *

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment,

ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

* * * * *

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

* * * * *

(23) The terms "remove" or "removal" means[3] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate

[3] So in original. Probably should be "mean".

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, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

(24) The terms "remedy" or "remedial action" means[3] those 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 the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means[3] remove, removal, remedy, and remedial action;,[4] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

* * * * *

(35)(A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the

[4] So in original.

circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

> (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
>
> (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
>
> (iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

(B) REASON TO KNOW.—

(i) ALL APPROPRIATE INQUIRIES.—To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to—

(aa) stop any continuing release;

(bb) prevent any threatened future release; and

(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

(ii) STANDARDS AND PRACTICES.—Not later than 2 years after January 11, 2002, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

(iii) CRITERIA.—In promulgating regulations that establish the standards and practices

referred to in clause (ii), the Administrator shall include each of the following:

(I) The results of an inquiry by an environmental professional.

(II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.

(III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.

(IV) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

(V) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.

(VI) Visual inspections of the facility and of adjoining properties.

(VII) Specialized knowledge or experience on the part of the defendant.

(VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated.

(IX) Commonly known or reasonably ascertainable information about the property.

(X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(iv) INTERIM STANDARDS AND PRACTICES.—

(I) PROPERTY PURCHASED BEFORE May 31, 1997.—With respect to property purchased before May 31, 1997, in making a determination with respect to a defendant described in clause (i), a court shall take into account—

(aa) any specialized knowledge or experience on the part of the defendant;

(bb) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(cc) commonly known or reasonably ascertainable information about the property;

(dd) the obviousness of the presence or likely presence of contamination at the property; and

(ee) the ability of the defendant to detect the contamination by appropriate inspection.

(II) PROPERTY PURCHASED ON OR AFTER MAY 31, 1997.—With respect to property purchased on or after May 31, 1997, and until the Administrator promulgates the regulations

described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as "Standard E1527-97", entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process", shall satisfy the requirements in clause (i).

(v) SITE INSPECTION AND TITLE SEARCH.—In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or

threatened release of a hazardous substance which is the subject of the action relating to the facility.

* * * * *

(40) BONA FIDE PROSPECTIVE PURCHASER.—The term "bona fide prospective purchaser" means a person (or a tenant of a person) that acquires ownership of a facility after January 11, 2002, and that establishes each of the following by a preponderance of the evidence:

(A) DISPOSAL PRIOR TO ACQUISITION.—All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(B) INQUIRIES.—

(i) IN GENERAL.—The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).

(ii) STANDARDS AND PRACTICES.—The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) shall be considered to satisfy the requirements of this subparagraph.

(iii) RESIDENTIAL USE.—In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for

further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) NOTICES.—The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(D) CARE.—The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—

(i) stop any continuing release;

(ii) prevent any threatened future release; and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(E) COOPERATION, ASSISTANCE, AND ACCESS.—The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(F) INSTITUTIONAL CONTROL.—The person—

(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility;

(ii) and does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

(G) REQUESTS; SUBPOENAS.—The person complies with any request for information or administrative subpoena issued by the President under this chapter.

(H) NO AFFILIATION.—The person is not—

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

* * * * *

5. 42 U.S.C. 9606(a) (CERCLA Section 106) provides:

Abatement actions

(a) Maintenance, jurisdiction, etc.

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

* * * * *

6. 42 U.S.C. 9607(a), (b), (q), (r) (CERCLA Section 107) provides:

Liability

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

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

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

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

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

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

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

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

(b) Defenses

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

(1) an act of God;

(2) an act of war;

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

(4) any combination of the foregoing paragraphs.

* * * * *

(q) Contiguous properties

(1) Not considered to be an owner or operator

(A) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not—

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person—

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) at the time at which the person acquired the property, the person—

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) Demonstration

To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) Bona fide prospective purchaser

Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 9601(40) of this

title if the person is otherwise described in that section.

(D) Ground water

With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) Effect of law

With respect to a person described in this subsection, nothing in this subsection—

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a).

(3) Assurances

The Administrator may—

(A) issue an assurance that no enforcement action under this chapter will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 9613(f) of this title.

(r) Prospective purchaser and windfall lien

(1) Limitation on liability

Notwithstanding subsection (a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the bona fide prospective purchaser being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) Lien

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) Conditions

The conditions referred to in paragraph (2) are the following:

(A) Response action

A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) Fair market value

The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) Amount; duration

A lien under paragraph (2)—

(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of—

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 9613 of this title, recovery of all response costs incurred at the facility.

7. 42 U.S.C. 9613 (CERCLA Section 113) provides:

Civil proceedings

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

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

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.

Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

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

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

(d) Litigation commenced prior to December 11, 1980

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

(e) Nationwide service of process

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

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[1] See References in Text note below.

(f) Contribution

(1) Contribution

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

(2) Settlement

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

(3) Persons not party to settlement

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

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

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

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

(g) Period in which action may be brought

(1) Actions for natural resource damages

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

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

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

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

(2) Actions for recovery of costs

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

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant

a waiver under section 9604(c)(1)(C) of this title for continued response action; and

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

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

(3) Contribution

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

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

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

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

(5) Actions to recover indemnification payments

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

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

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

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

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

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

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

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

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this

chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

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

(i) Intervention

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

(j) Judicial review

(1) Limitation

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

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall

uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

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

(4) Procedural errors

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

(k) Administrative record and participation procedures

(1) Administrative record

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

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

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

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

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

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

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

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

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

(C) Interim record

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

(D) Potentially responsible parties

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

paragraph shall be construed to be a defense to liability.

(*l*) Notice of actions

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

8. 42 U.S.C. 9614(a), (b) (CERCLA Section 114) provides:

Relationship to other law

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

Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

(b) Recovery under other State or Federal law of compensation for removal costs or damages, or payment of claims

Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any 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 chapter.

* * * * *

9. 42 U.S.C. 9619(a)(1), (c)(1), (d), (e) (CERCLA Section 119) provides:

Response action contractors

(a) Liability of response action contractors

(1) Response action contractors

A person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this subchapter or under any other Federal law to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release or threatened release.

* * * * *

(c) Indemnification

(1) In general

The President may agree to hold harmless and indemnify any response action contractor meeting the requirements of this subsection

against any liability (including the expenses of litigation or settlement) for negligence arising out of the contractor's performance in carrying out response action activities under this subchapter, unless such liability was caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct.

* * * * *

(d) Exception

The exemption provided under subsection (a) and the authority of the President to offer indemnification under subsection (c) shall not apply to any person covered by the provisions of paragraph (1), (2), (3), or (4) of section 9607(a) of this title with respect to the release or threatened release concerned if such person would be covered by such provisions even if such person had not carried out any actions referred to in subsection (e) of this section.

(e) Definitions

For purposes of this section—

(1) Response action contract

The term "response action contract" means any written contract or agreement entered into by a response action contractor (as defined in paragraph (2)(A) of this subsection) with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 9604(d)(1) of this title; or

(D) any potentially responsible party carrying out an agreement under section 9606 or 9622 of this title;

to provide any remedial action under this chapter at a facility listed on the National Priorities List, or any removal under this chapter, with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from the facility or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such facility.

10. 42 U.S.C. 9620(e) (CERCLA Section 120) provides:

(e) Required action by department

(6) Settlements with other parties

If the Administrator, in consultation with the head of the relevant department, agency, or instrumentality of the United States, determines that remedial investigations and feasibility studies or remedial action will be done properly at the Federal facility by another potentially responsible party within the deadlines provided in paragraphs (1), (2), and (3) of this subsection, the Administrator may enter into an agreement with such party under section 9622 of this title (relating to

settlements). Following approval by the Attorney General of any such agreement relating to a remedial action, the agreement shall be entered in the appropriate United States district court as a consent decree under section 9606 of this title.

* * * * *

11. 42 U.S.C. 9621 (CERCLA Section 121) provides:

Cleanup standards

(a) Selection of remedial action

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

(b) General rules

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

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

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

(B) the goals, objectives, and requirements of the Solid Waste Disposal Act;

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

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

(E) long-term maintenance costs;

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

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

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

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

(c) Review

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

of facilities for which such review is required, the results of all such reviews, and any actions taken as a result of such reviews.

(d) Degree of cleanup

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

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

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

> limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner,

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

(B)(i) In determining whether or not any water quality criteria under the Clean Water Act [33 U.S.C. 1251 et seq.] is relevant and appropriate under the circumstances of the release or threatened release, the President shall consider the designated or potential use of the surface or groundwater, the environmental

media affected, the purposes for which such criteria were developed, and the latest information available.

(ii) For the purposes of this section, a process for establishing alternate concentration limits to those otherwise applicable for hazardous constituents in groundwater under subparagraph (A) may not be used to establish applicable standards under this paragraph if the process assumes a point of human exposure beyond the boundary of the facility, as defined at the conclusion of the remedial investigation and feasibility study, except where—

(I) there are known and projected points of entry of such groundwater into surface water; and

(II) on the basis of measurements or projections, there is or will be no statistically significant increase of such constituents from such groundwater in such surface water at the point of entry or at any point where there is reason to believe accumulation of constituents may occur downstream; and

(III) the remedial action includes enforceable measures that will preclude human exposure to the contaminated groundwater at any point between the facility boundary and all known and projected points of entry of such groundwater into surface water

then the assumed point of human exposure may be at such known and projected points of entry.

(C)(i) Clause (ii) of this subparagraph shall be applicable only in cases where, due to the President's

selection, in compliance with subsection (b)(1), of a proposed remedial action which does not permanently and significantly reduce the volume, toxicity, or mobility of hazardous substances, pollutants, or contaminants, the proposed disposition of waste generated by or associated with the remedial action selected by the President is land disposal in a State referred to in clause (ii).

(ii) Except as provided in clauses (iii) and (iv), a State standard, requirement, criteria, or limitation (including any State siting standard or requirement) which could effectively result in the statewide prohibition of land disposal of hazardous substances, pollutants, or contaminants shall not apply.

(iii) Any State standard, requirement, criteria, or limitation referred to in clause (ii) shall apply where each of the following conditions is met:

(I) The State standard, requirement, criteria, or limitation is of general applicability and was adopted by formal means.

(II) The State standard, requirement, criteria, or limitation was adopted on the basis of hydrologic, geologic, or other relevant considerations and was not adopted for the purpose of precluding onsite remedial actions or other land disposal for reasons unrelated to protection of human health and the environment.

(III) The State arranges for, and assures payment of the incremental costs of utilizing, a

facility for disposition of the hazardous substances, pollutants, or contaminants concerned.

(iv) Where the remedial action selected by the President does not conform to a State standard and the State has initiated a law suit against the Environmental Protection Agency prior to May 1, 1986, to seek to have the remedial action conform to such standard, the President shall conform the remedial action to the State standard. The State shall assure the availability of an offsite facility for such remedial action.

(3) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act [42 U.S.C. 6924, 6925] (or, where applicable, in compliance with the Toxic Substances Control Act [15 U.S.C. 2601 et seq.] or other applicable Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be transferred to a land disposal facility only if the President determines that both of the following requirements are met:

(A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.

(B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator

under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.].

The President shall notify the owner or operator of such facility of determinations under this paragraph.

(4) The President may select a remedial action meeting the requirements of paragraph (1) that does not attain a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation as required by paragraph (2) (including subparagraph (B) thereof), if the President finds that—

(A) the remedial action selected is only part of a total remedial action that will attain such level or standard of control when completed;

(B) compliance with such requirement at that facility will result in greater risk to human health and the environment than alternative options;

(C) compliance with such requirements is technically impracticable from an engineering perspective;

(D) the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria, or limitation, through use of another method or approach;

(E) with respect to a State standard, requirement, criteria, or limitation, the State has not consistently applied (or demonstrated the intention to consistently apply) the standard,

requirement, criteria, or limitation in similar circumstances at other remedial actions within the State; or

(F) in the case of a remedial action to be undertaken solely under section 9604 of this title using the Fund, selection of a remedial action that attains such level or standard of control will not provide a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threats.

The President shall publish such findings, together with an explanation and appropriate documentation.

(e) Permits and enforcement

(1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

(2) A State may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is located. Any consent decree shall require the parties to attempt expeditiously to resolve disagreements concerning implementation of the remedial action informally with the appropriate

Federal and State agencies. Where the parties agree, the consent decree may provide for administrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree.

(f) State involvement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 9606 of this title before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard, requirement, criteria, or limitation if the State establishes, on the administrative record, that the finding of the

President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree.

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

(3)(A) This paragraph shall apply to remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States. At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4) of this section, the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.

(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have

the remedial action conform to such standard, requirement, criteria, or limitation, the State may maintain an action as follows:

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

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

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

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

12. 42 U.S.C. 9622 (CERCLA Section 122) provides:

Settlements

(a) Authority to enter into agreements

The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

(b) Agreements with potentially responsible parties

(1) Mixed funding

An agreement under this section may provide that the President will reimburse the parties to the agreement from the Fund, with interest, for

certain costs of actions under the agreement that the parties have agreed to perform but which the President has agreed to finance. In any case in which the President provides such reimbursement, the President shall make all reasonable efforts to recover the amount of such reimbursement under section 9607 of this title or under other relevant authorities.

(2) Reviewability

The President's decisions regarding the availability of fund financing under this subsection shall not be subject to judicial review under subsection (d) of this section.

(3) Retention of funds

If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

(4) Future obligation of Fund

In the case of a completed remedial action pursuant to an agreement described in paragraph (1), the Fund shall be subject to an obligation for subsequent remedial actions at the same facility but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action. The Fund's obligation for such future remedial action may be met through Fund

expenditures or through payment, following settlement or enforcement action, by parties who were not signatories to the original agreement.

(c) Effect of agreement

(1) Liability

Whenever the President has entered into an agreement under this section, the liability to the United States under this chapter of each party to the agreement, including any future liability to the United States, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with subsection (f) of this section. A covenant not to sue may provide that future liability to the United States of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this section shall limit or otherwise affect the authority of any court to review in the consent decree process under subsection (d) of this section any covenant not to sue contained in an agreement under this section. In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties.

(2) Actions against other persons

If an agreement has been entered into under this section, the President may take any action

under section 9606 of this title against any person who is not a party to the agreement, once the period for submitting a proposal under subsection (e)(2)(B) of this section has expired. Nothing in this section shall be construed to affect either of the following:

(A) The liability of any person under section 9606 or 9607 of this title with respect to any costs or damages which are not included in the agreement.

(B) The authority of the President to maintain an action under this chapter against any person who is not a party to the agreement.

(d) Enforcement

(1) Cleanup agreements

(A) Consent decree

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g) of this section, the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

(B) Effect

The entry of any consent decree under this subsection shall not be construed to be an acknowledgment by the parties that the release or threatened release concerned constitutes an imminent and substantial endangerment to the public health or welfare or the environment. Except as otherwise provided in the Federal Rules of Evidence, the participation by any party in the process under this section shall not be considered an admission of liability for any purpose, and the fact of such participation shall not be admissible in any judicial or administrative proceeding, including a subsequent proceeding under this section.

(C) Structure

The President may fashion a consent decree so that the entering of such decree and compliance with such decree or with any determination or agreement made pursuant to this section shall not be considered an admission of liability for any purpose.

(2) Public participation

(A) Filing of proposed judgment

At least 30 days before a final judgment is entered under paragraph (1), the proposed judgment shall be filed with the court.

(B) Opportunity for comment

The Attorney General shall provide an opportunity to persons who are not named as

parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

(3) 9604(b) agreements

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to action under section 9604(b) of this title, the President shall issue an order or enter into a decree setting forth the obligations of such party. The United States district court for the district in which the release or threatened release occurs may enforce such order or decree.

(e) Special notice procedures

(1) Notice

Whenever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action (including any action described in section 9604(b) of this title) and would expedite remedial action, the President shall so notify all such parties and shall provide

them with information concerning each of the following:

> (A) The names and addresses of potentially responsible parties (including owners and operators and other persons referred to in section 9607(a) of this title), to the extent such information is available.
>
> (B) To the extent such information is available, the volume and nature of substances contributed by each potentially responsible party identified at the facility.
>
> (C) A ranking by volume of the substances at the facility, to the extent such information is available.

The President shall make the information referred to in this paragraph available in advance of notice under this paragraph upon the request of a potentially responsible party in accordance with procedures provided by the President. The provisions of subsection (e) of section 9604 of this title regarding protection of confidential information apply to information provided under this paragraph. Disclosure of information generated by the President under this section to persons other than the Congress, or any duly authorized Committee thereof, is subject to other privileges or protections provided by law, including (but not limited to) those applicable to attorney work product. Nothing contained in this paragraph or in other provisions of this chapter shall be construed, interpreted, or applied to diminish the required disclosure of information under other provisions of this or other Federal or State laws.

(2) Negotiation

(A) Moratorium

Except as provided in this subsection, the President may not commence action under section 9604(a) of this title or take any action under section 9606 of this title for 120 days after providing notice and information under this subsection with respect to such action. Except as provided in this subsection, the President may not commence a remedial investigation and feasibility study under section 9604(b) of this title for 90 days after providing notice and information under this subsection with respect to such action. The President may commence any additional studies or investigations authorized under section 9604(b) of this title, including remedial design, during the negotiation period.

(B) Proposals

Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 9606 of this title shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 9606 of this title. Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 9604(b) of this title shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 9604(b) of this title.

(C) Additional parties

If an additional potentially responsible party is identified during the negotiation period or after an agreement has been entered into under this subsection concerning a release or threatened release, the President may bring the additional party into the negotiation or enter into a separate agreement with such party.

(3) Preliminary allocation of responsibility

(A) In general

The President shall develop guidelines for preparing nonbinding preliminary allocations of responsibility. In developing these guidelines the President may include such factors as the President considers relevant, such as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors. When it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility.

(B) Collection of information

To collect information necessary or appropriate for performing the allocation under subparagraph (A) or for otherwise implementing

this section, the President may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the President deems necessary. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In the event of contumacy or failure or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as a contempt thereof.

(C) Effect

The nonbinding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding, and no court shall have jurisdiction to review the nonbinding preliminary allocation of responsibility. The nonbinding preliminary allocation of responsibility shall not constitute an apportionment or other statement on the divisibility of harm or causation.

(D) Costs

The costs incurred by the President in producing the nonbinding preliminary allocation of responsibility shall be reimbursed by the potentially responsible parties whose offer is accepted by the President. Where an offer under this section is not accepted, such costs shall be considered costs of response.

(E) Decision to reject offer

Where the President, in his discretion, has provided a nonbinding preliminary allocation of responsibility and the potentially responsible parties have made a substantial offer providing for response to the President which he rejects, the reasons for the rejection shall be provided in a written explanation. The President's decision to reject such an offer shall not be subject to judicial review.

(4) Failure to propose

If the President determines that a good faith proposal for undertaking or financing action under section 9606 of this title has not been submitted within 60 days of the provision of notice pursuant to this subsection, the President may thereafter commence action under section 9604(a) of this title or take an action against any person under section 9606 of this title. If the President determines that a good faith proposal for undertaking or financing action under section 9604(b) of this title has not been submitted within 60 days after the provision of notice pursuant to this subsection, the President may thereafter commence action under section 9604(b) of this title.

(5) Significant threats

Nothing in this subsection shall limit the President's authority to undertake response or enforcement action regarding a significant threat to public health or the environment within the negotiation period established by this subsection.

(6) Inconsistent response action

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

(f) Covenant not to sue

(1) Discretionary covenants

The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this chapter, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite, if each of the following conditions is met:

(A) The covenant not to sue is in the public interest.

(B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under section 9605 of this title.

(C) The person is in full compliance with a consent decree under section 9606 of this title (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.

(D) The response action has been approved by the President.

(2) Special covenants not to sue

In the case of any person to whom the President is authorized under paragraph (1) of this subsection to provide a covenant not to sue, for the portion of remedial action—

(A) which involves the transport and secure disposition offsite of hazardous substances in a facility meeting the requirements of sections 6924(c), (d), (e), (f), (g), (m), (*o*), (p), (u), and (v) and 6925(c) of this title, where the President has rejected a proposed remedial action that is consistent with the National Contingency Plan that does not include such offsite disposition and has thereafter required offsite disposition; or

(B) which involves the treatment of hazardous substances so as to destroy, eliminate, or permanently immobilize the hazardous constituents of such substances, such that, in the judgment of the President, the substances no longer present any current or currently foreseeable future significant risk to public health, welfare or the environment, no byproduct of the treatment or destruction process presents any significant hazard to public health, welfare or the environment, and all byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or currently foreseeable future significant risk to public health, welfare or the environment, the

President shall provide such person with a covenant not to sue with respect to future liability to the United States under this chapter for a future release or threatened release of hazardous substances from such facility, and a person provided such covenant not to sue shall not be liable to the United States under section 9606 or 9607 of this title with respect to such release or threatened release at a future time.

(3) Requirement that remedial action be completed

A covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this chapter at the facility that is the subject of such covenant.

(4) Factors

In assessing the appropriateness of a covenant not to sue under paragraph (1) and any condition to be included in a covenant not to sue under paragraph (1) or (2), the President shall consider whether the covenant or condition is in the public interest on the basis of such factors as the following:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

(5) Satisfactory performance

Any covenant not to sue under this subsection shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned.

(6) Additional condition for future liability

(A) Except for the portion of the remedial action which is subject to a covenant not to sue under paragraph (2) or under subsection (g) of this section (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the

release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned.

(B) In extraordinary circumstances, the President may determine, after assessment of relevant factors such as those referred to in paragraph (4) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception referred to in subparagraph (A) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility.

(C) The President is authorized to include any provisions allowing future enforcement action under section 9606 or 9607 of this title that in the discretion of the President are necessary and appropriate to assure protection of public health, welfare, and the environment.

(g) De minimis settlements

(1) Expedited final settlement

Whenever practicable and in the public interest, as determined by the President, the President

shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

> (A) Both of the following are minimal in comparison to other hazardous substances at the facility:
>
> > (i) The amount of the hazardous substances contributed by that party to the facility.
> >
> > (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.
>
> (B) The potentially responsible party—
>
> > (i) is the owner of the real property on or in which the facility is located;
> >
> > (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and
> >
> > (iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.
>
> This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge

that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(2) Covenant not to sue

The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f) of this section.

(3) Expedited agreement

The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

(4) Consent decree or administrative order

A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed $500,000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release

or threatened release occurs may enforce any such administrative order.

(5) Effect of agreement

A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(6) Settlements with other potentially responsible parties

Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this chapter.

(7) Reduction in settlement amount based on limited ability to pay

(A) In general

The condition for settlement under this paragraph is that the potentially responsible party is a person who demonstrates to the President an inability or a limited ability to pay response costs.

(B) Considerations

In determining whether or not a demonstration is made under subparagraph (A) by a person, the President shall take into consideration the ability of the person to pay

response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues.

(C) Information

A person requesting settlement under this paragraph shall promptly provide the President with all relevant information needed to determine the ability of the person to pay response costs.

(D) Alternative payment methods

If the President determines that a person is unable to pay its total settlement amount at the time of settlement, the President shall consider such alternative payment methods as may be necessary or appropriate.

(8) Additional conditions for expedited settlements

(A) Waiver of claims

The President shall require, as a condition for settlement under this subsection, that a potentially responsible party waive all of the claims (including a claim for contribution under this chapter) that the party may have against other potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that requiring a waiver would be unjust.

(B) Failure to comply

The President may decline to offer a settlement to a potentially responsible party under this subsection if the President determines that the potentially responsible party has failed to comply with any request for access or information or an administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action with respect to the facility.

(C) Responsibility to provide information and access

A potentially responsible party that enters into a settlement under this subsection shall not be relieved of the responsibility to provide any information or access requested in accordance with subsection (e)(3)(B) of this section or section 9604(e) of this title.

(9) Basis of determination

If the President determines that a potentially responsible party is not eligible for settlement under this subsection, the President shall provide the reasons for the determination in writing to the potentially responsible party that requested a settlement under this subsection.

(10) Notification

As soon as practicable after receipt of sufficient information to make a determination, the President shall notify any person that the President determines is eligible under paragraph (1) of

the person's eligibility for an expedited settlement.

(11) No judicial review

A determination by the President under paragraph (7), (8), (9), or (10) shall not be subject to judicial review.

(12) Notice of settlement

After a settlement under this subsection becomes final with respect to a facility, the President shall promptly notify potentially responsible parties at the facility that have not resolved their liability to the United States of the settlement.

(h) Cost recovery settlement authority

(1) Authority to settle

The head of any department or agency with authority to undertake a response action under this chapter pursuant to the national contingency plan may consider, compromise, and settle a claim under section 9607 of this title for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action. In the case of any facility where the total response costs exceed $500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

(2) Use of arbitration

Arbitration in accordance with regulations promulgated under this subsection may be used

as a method of settling claims of the United States where the total response costs for the facility concerned do not exceed $500,000 (excluding interest). After consultation with the Attorney General, the department or agency head may establish and publish regulations for the use of arbitration or settlement under this subsection.

(3) Recovery of claims

If any person fails to pay a claim that has been settled under this subsection, the department or agency head shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of the settlement. In such an action, the terms of the settlement shall not be subject to review.

(4) Claims for contribution

A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(i) Settlement procedures

(1) Publication in Federal Register

At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final under subsection (h) of this section, or under subsection (g) of this section

in the case of a settlement embodied in an administrative order, the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement.

(2) Comment period

For a 30-day period beginning on the date of publication of notice under paragraph (1) of a proposed settlement, the head of the department or agency which has jurisdiction over the proposed settlement shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

(3) Consideration of comments

The head of the department or agency shall consider any comments filed under paragraph (2) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

(j) Natural resources

(1) Notification of trustee

Where a release or threatened release of any hazardous substance that is the subject of negotiations under this section may have resulted in damages to natural resources under the

trusteeship of the United States, the President shall notify the Federal natural resource trustee of the negotiations and shall encourage the participation of such trustee in the negotiations.

(2) Covenant not to sue

An agreement under this section may contain a covenant not to sue under section 9607(a)(4)(C) of this title for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

(k) Section not applicable to vessels

The provisions of this section shall not apply to releases from a vessel.

(*l*) Civil penalties

A potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement under this section or section 9620 of this title (relating to Federal facilities) or which is a party to an agreement under section 9620 of this title and which fails or refuses to comply with any term or condition of the order, decree or agreement shall be

subject to a civil penalty in accordance with section 9609 of this title.

(m) Applicability of general principles of law

In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this chapter shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.

13. 42 U.S.C. 9624 (CERCLA Section 124) provides:

Methane recovery

(a) In general

In the case of a facility at which equipment for the recovery or processing (including recirculation of condensate) of methane has been installed, for purposes of this chapter:

(1) The owner or operator of such equipment shall not be considered an "owner or operator", as defined in section 9601(20) of this title, with respect to such facility.

(2) The owner or operator of such equipment shall not be considered to have arranged for disposal or treatment of any hazardous substance at such facility pursuant to section 9607 of this title.

(3) The owner or operator of such equipment shall not be subject to any action under section 9606 of this title with respect to such facility.

(b) Exceptions

Subsection (a) of this section does not apply with respect to a release or threatened release of a hazardous substance from a facility described in subsection (a) of this section if either of the following circumstances exist:

> (1) The release or threatened release was primarily caused by activities of the owner or operator of the equipment described in subsection (a) of this section.
>
> (2) The owner or operator of such equipment would be covered by paragraph (1), (2), (3), or (4) of subsection (a) of section 9607 of this title with respect to such release or threatened release if he were not the owner or operator of such equipment.

In the case of any release or threatened release referred to in paragraph (1), the owner or operator of the equipment described in subsection (a) shall be liable under this chapter only for costs or damages primarily caused by the activities of such owner or operator.

14. 42 U.S.C. 9652 (CERCLA Section 302) provides:

Effective dates; savings provisions

(a) Unless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980.

(b) Any regulation issued pursuant to any provisions of section 1321 of Title 33 which is repealed or superseded by this chapter and which is in effect on

the date immediately preceding the effective date of this chapter shall be deemed to be a regulation issued pursuant to the authority of this chapter and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(c) Any regulation—

(1) respecting financial responsibility,

(2) issued pursuant to any provision of law repealed or superseded by this chapter, and

(3) in effect on the date immediately preceding the effective date of this chapter shall be deemed to be a regulation issued pursuant to the authority of this chapter and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

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

15. 42 U.S.C. 9657 (CERCLA Section 308) provides:

Separability; contribution

If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby. If an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contribution shall be treated as having no force and effect.

16. 42 U.S.C. 9658 (CERCLA Section 309) provides:

Actions under State law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substance cases

(1) Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or

contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607

Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions

As used in this section—

(1) Subchapter I terms

The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules

In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

17. 42 U.S.C. 9659 (CERCLA Section 310) provides:

Citizens suits

(a) Authority to bring civil actions

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

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

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

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

(b) Venue

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

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

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

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

(c) Relief

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

(d) Rules applicable to subsection (a)(1) actions

(1) Notice

No action may be commenced under subsection (a)(1) of this section before 60 days after the plaintiff has given notice of the violation to each of the following:

(A) The President.

(B) The State in which the alleged violation occurs.

(C) Any alleged violator of the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

Notice under this paragraph shall be given in such manner as the President shall prescribe by regulation.

(2) Diligent prosecution

No action may be commenced under paragraph (1) of subsection (a) of this section if the President has commenced and is diligently prosecuting an action under this chapter, or under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] to require compliance with the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

(e) Rules applicable to subsection (a)(2) actions

No action may be commenced under paragraph (2) of subsection (a) of this section before the 60th day

following the date on which the plaintiff gives notice to the Administrator or other department, agency, or instrumentality that the plaintiff will commence such action. Notice under this subsection shall be given in such manner as the President shall prescribe by regulation.

(f) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) Intervention

In any action under this section, the United States or the State, or both, if not a party may intervene as a matter of right. For other provisions regarding intervention, see section 9613 of this title.

(h) Other rights

This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of this title or as otherwise provided in section 9658 of this title (relating to actions under State law).

(i) Definitions

The terms used in this section shall have the same meanings as when used in subchapter I of this chapter.