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High Court Opens Can Of Worms With Superfund Ruling

By **Juan Carlos Rodriguez**

Law360 (April 21, 2020, 6:59 PM EDT) -- The U.S. Supreme Court's ruling that federal Superfund law does not preclude individuals from filing state law claims for further cleanup of contaminated sites muddies a subject attorneys thought was clear, and will lead to more — and more complicated — litigation.

Superfund cleanups can be complex and drawn-out affairs, with parties haggling over the scope of the effort, which entities will be responsible and for how much, and how clean the remediation will make the location when it's all done. U.S. Environmental Protection Agency settlements usually limit parties' post-deal liability under the Comprehensive Environmental Response, Compensation and Liability Act, but the high court's **Tuesday ruling** introduces significant uncertainty into that process.

In a split decision, the justices said CERCLA does not preclude the right to assert state law claims like nuisance and trespass that don't arise under the act. Companies may be liable for the plaintiffs' remediation beyond what's required under the act "so long as the landowners first obtain EPA approval for the remedial work they seek to carry out," the majority opinion said.

The ruling will encourage more litigation by residents or other parties with interests in properties surrounding a Superfund site that will be more difficult to tackle at the initial stages, particularly in cases where the EPA has not already issued a record of decision that established a cleanup for properties in question, said John McGahren, a partner at Morgan Lewis & Bockius LLP and deputy chair of the firm's global environmental practice.

"In the past, a judge might have been willing to dismiss that on a motion to dismiss," McGahren said. "That will likely change. Now we're talking about a much more factual analysis."

And in most states, people can enforce state environmental requirements through citizen suits, said David Mandelbaum, a partner at Greenberg Traurig LLP and co-chair of the firm's environmental practice group.

"For example, under the Pennsylvania Air Pollution Control Act, any citizen of Pennsylvania can sue to enforce a requirement. Does that person get to sue in state court to enforce the state rule against some cleanup?" he said. "This ruling is going to create problems that I would have said, before, were resolved. Now I think there are opportunities for people who are dissatisfied with a cleanup to bring lawsuits, to survive motions to dismiss, and to create a puzzle as to what's required."

Noah Perch-Ahern, a partner at Greenberg Glusker Fields Claman & Machtinger LLP,

echoed that sentiment, saying that in the past most courts generally found that state law claims could not be used to challenge EPA cleanups. He noted that Montana, along with about half of the rest of the states, allows for "restoration damages," which could add significant costs to cleanups.

"Those types of claims can allow for damages that exceed the value of the property," Perch-Ahern said. "A landowner may say my property is worth \$1 million, it's going to cost \$2 million to clean it up, and if the state allows that type of damage, then you can go seek those higher costs, even though they may be more than the property is worth."

And since there is no body of law establishing what exactly constitutes a valid "challenge" to an EPA cleanup, he said courts could see some creative lawsuits testing the boundaries of what's a legally acceptable challenge.

Cale Jaffe, an environmental law professor at the University of Virginia who helped write an amicus brief for Montana green groups supporting the landowners, said there was some concern among environmentalists that the lawsuit could have "blown up" CERCLA by introducing new opportunities to challenge cleanup plans.

"If environmental groups or landowners can use state law to force EPA to go above and beyond, the question was, 'Can industry do the reverse and use state law to prevent EPA from going above and beyond?'" he said. "And I think the clear answer from the Supreme Court on that is no, it's a one-way ratchet. An EPA CERCLA remedy sets the floor, and state law can't weaken that."

The court did say that any remediation effort must get the approval of the EPA, which should put some limits on what parties can achieve in court, but Perch-Ahern said it's not as clear as it seems. He said the court may have "unwittingly" drawn in very small cleanups, on single properties, with its ruling, and that could affect property rights and takings considerations.

State regulators and landowners will have to think about what that means when they're dealing with a cleanup that's far away from the main cleanup action of a Superfund site, but is still affected by the contamination, perhaps at a much lower level, he said.

"There's going to be a lot of thinking at the state level and probably at federal level too about how the state and federal governments are going to cooperate to handle cleanups where there may be a Superfund site that covers a large area," Perch-Ahern said.

McGahren said one of the important incentives for companies that enter into CERCLA settlement agreements with the EPA is obtaining clear standards and obligations that it can show a judge if it's ever challenged on what it's done.

He said companies are likely to still want to reach formal agreements with the federal government, but the court's ruling could change how the deals are structured, in an attempt to provide even more certainty to the parties doing the cleanups.

Mandelbaum said it will make negotiations more difficult.

"Every additional uncertain factor floating around out there, every additional claim bouncing around in the universe that you may have to pay for or insure against, reduces the amount available to deal with the United States," he said. "It's complication rather than simplification in a world that's already pretty complicated."

--Editing by Brian Baresch and Kelly Duncan.

Correction: An earlier version of this story omitted a word from a description of when early Superfund litigation will be more difficult to tackle. The error has been corrected.