

# **APPENDIX**

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**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

W.R. GRACE & CO.; KOOTENAI  
DEVELOPMENT, CORPORATION; W.R.  
GRACE & CO. CONN.,

*Defendants-Appellants.*

No. 03-35924

D.C. No.

CV-01-00072-DWM

OPINION

Appeal from the United States District Court  
for the District of Montana  
Donald W. Molloy, District Judge, Presiding

Argued and Submitted  
February 7, 2005—Seattle, Washington

Filed December 1, 2005

Before: Betty B. Fletcher, M. Margaret McKeown, and  
Carlos T. Bea, Circuit Judges.

Opinion by Judge McKeown;  
Concurrence by Judge Bea

**COUNSEL**

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John T. Stahr, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C.; James Freeman, Environment and Natural Resources Division, U.S. Department of Justice, Denver, Colorado, for the plaintiff-appellee.

David L. Mulliken, Esq., Latham & Watkins, LLP, San Diego, California, for the amicus.

**OPINION**

McKEOWN, Circuit Judge:

Libby, Montana, sits sixty-five miles south of the Canadian border. The seemingly rustic and picturesque environment of this area masks a troubling history—the community has been plagued with asbestos-related contamination. In 1999, the Environmental Protection Agency (“EPA”) was called in to address disturbing health reports due to asbestos-related contamination. We must decide whether, in responding to this threat, the EPA exceeded the bounds of its authority to conduct cleanup activities under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 et seq. We hold that it did not.

Defendants W.R. Grace & Co.,<sup>1</sup> Kootenai Development Corporation, and W.R. Grace & Co.-Conn. (collectively, “Grace”) do not dispute that they are financially obligated

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<sup>1</sup> Although the case caption has remained consistent, we note that the district court’s order states that the parties stipulated to the dismissal of W.R. Grace & Co., a Delaware corporation that was incorporated in 1998 and is the sole shareholder of W.R. Grace & Co.-Conn. *United States v. W.R. Grace & Co.-Conn.*, 280 F. Supp. 2d 1135, 1139 n.1 (D. Mont. 2002) (“*Grace I*”).

under CERCLA to assist with the cleanup of asbestos originating from their former mining and processing operations near Libby.<sup>2</sup> Instead, Grace contests the EPA's characterization of the cleanup as a removal action rather than a remedial action under CERCLA. If the cleanup is a remedial action, which is often characterized as a permanent cleanup, then Grace argues that the EPA did not fulfill the regulatory requirements for remedial actions. For example, a remedial action requires certain analysis of the costs and effectiveness of the remediation and also requires inclusion on the National Priority List. See 40 C.F.R. §§ 300.425(b)(1), 300.430(e)(7). In contrast, the regulatory requirements for removal actions, which provide the EPA with substantial flexibility to tailor prompt and effective responses to immediate threats to human health and the environment, are considerably relaxed.

Grace argues that the EPA circumvented the regulatory safeguards by conducting a remedial action under the guise of a removal, thereby giving the EPA free rein to conduct what Grace styles as "the quintessential remedial action" under the less-restrictive requirements applied to removals. Grace presents this as a legal question: Is the EPA's characterization of its activities in Libby as a removal action correct as a matter of law?

Grace further contends that even if the action is appropriately classified as a removal action, the district court erred in exempting the action from CERCLA's general 12-month, \$2 million cap for removal actions and in granting the EPA over \$54 million in reimbursement plus a declaratory judgment for future costs. Finally, Grace

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<sup>2</sup> In February 2005, the United States unsealed a criminal indictment charging Grace and various of its employees with offenses relating to knowingly exposing miners and Libby residents to asbestos. See *Charges Issued Over Asbestos at a Mine*, N.Y. Times, Feb. 8, 2005, at A16. This pending indictment does not affect these proceedings.

disputes the accounting methods used to calculate the EPA's indirect costs.

The situation confronting the EPA in Libby is truly extraordinary. This cleanup site is not a remote, abandoned mine. Rather, the population of Libby and nearby communities, which the EPA estimates at about 12,000, faces ongoing, pervasive exposure to asbestos particles being released through documented exposure pathways. We cannot escape the fact that people are sick and dying as a result of this continuing exposure. Confronted with this information, the EPA determined on the basis of its professional judgment, and in accord with its administrative interpretation of the scope of removal actions, that the situation warranted an immediate, aggressive response to abate the public health threat.

Although we diverge from the district court's reasoning in some respects, we reach the same ultimate conclusion: The EPA's cleanup in Libby was a removal action that was exempt from the temporal and monetary cap. In light of the EPA's expertise in this area, we owe considerable deference, albeit not necessarily full Chevron deference, to its characterization of the cleanup activities as a removal action. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). We therefore affirm the judgment of the district court.

### **Background**

The outcome of this case is controlled by our interpretation of key provisions of CERCLA, a comprehensive statutory scheme to respond to environmental threats, obtain compensation from those responsible for the polluting activities, and assign liability to responsible parties. See Pub. L. No. 96-510, 94 Stat. 2767 (1980). Before applying CERCLA to the case at hand, we begin with a brief review of this statute as well as the background on the hazards afflicting Libby.

## I. CERCLA

A key component of CERCLA was the establishment of a trust fund, commonly known as “Superfund,” for use when responding to the release or threat of release of hazardous substances into the environment. *See* CERCLA, Subtitle B—Establishment of Hazardous Substance Response Trust Fund § 221, 94 Stat. at 2801-02; *see also* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986). Today, Superfund expenditures are directed by the provisions of CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan (“National Contingency Plan”), 40 C.F.R. pt. 300.<sup>3</sup>

CERCLA and the National Contingency Plan divide response actions into two broad categories: removal actions and remedial actions. *See* 42 U.S.C. § 9601(25). Removal actions<sup>4</sup> are typically described as time-sensitive responses

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<sup>3</sup> The National Contingency Plan “specifies procedures for preparing and responding to contaminations and was promulgated by the [EPA] pursuant to CERCLA.” *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. \_\_\_, 125 S. Ct. 577, 580 n.2 (2004); *see also* 42 U.S.C. § 9605. Last revised in 1994, *see* 59 Fed. Reg. 47,384 (Sept. 15, 1994), the National Contingency Plan has undergone several rounds of revisions since its initial publication.

<sup>4</sup> Although “removal action” is not itself defined in CERCLA, “remove” and “removal” are defined. In light of the central importance of the definition to this case, it is worth citing the rather cumbersome definition in its entirety:

The terms “remove” or “removal” means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] 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 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

to public health threats for which the EPA is granted considerable leeway in structuring the cleanup. *See, e.g., Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024 (8th Cir. 1998) (describing “removal actions” as “those taken to counter imminent and substantial threats to public health and welfare”). Superfund-financed removal actions generally are required to “be terminated after \$2 million has been obligated for the action or 12 months have elapsed from the date removal activities begin on-site.” 40 C.F.R. § 300.415(b)(5). These limitations are not, however, inviolate. The EPA<sup>5</sup> may exceed this cap if it determines one of two exemptions applies:

There is an immediate risk to public health or welfare of the United States or the environment; continued response actions are immediately required to prevent, limit, or mitigate an emergency; and such assistance will not otherwise be provided on a timely basis; or

Continued response action is otherwise appropriate and consistent with the remedial action to be taken.

40 C.F.R. § 300.415(b)(5); *see also* 42 U.S.C. § 9604(c)(1).

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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.

42 U.S.C. § 9601(23).

<sup>5</sup> In Executive Orders 12,580 and 12,777, the President delegated most functions and responsibilities to the EPA that were vested in him by CERCLA. *See* 40 C.F.R. § 300.100.

Remedial actions,<sup>6</sup> on the other hand, are often described as permanent remedies to threats for which an urgent response is not warranted. *See, e.g., Pub. Serv. Co. of Colo. v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir. 1999) (“In broad contrast, a remedial action seeks to effect a

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<sup>6</sup> As with “removal,” the definition of “remedial action” has a maze-like structure:

The terms “remedy” or “remedial action” means 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.

42 U.S.C. § 9601(24).

permanent remedy to the release of hazardous substances when there is no immediate threat to the public health.”).

The distinction between removal and remedial actions is critical under CERCLA because “[b]oth types of actions have substantial requirements, but the requirements for remedial actions are much more detailed and onerous.” *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1136 (10th Cir. 2002). For example, remedial actions are only eligible for Superfund financing when the site is listed on the National Priorities List.<sup>7</sup> See 40 C.F.R. § 300.425(b)(1). Further, the EPA is required to consider costs when selecting remedial alternatives whereas “CERCLA contains no corresponding mandate for removal actions.” *United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992); see also 40 C.F.R. § 300.430 (listing requirements for a selection of remedy including consideration of effectiveness, permanence, and cost). Because CERCLA provides that responsible parties shall be liable for “all costs of removal or remedial action incurred by the United States Government ... not inconsistent with the national contingency plan,” this distinction is vital to those held liable. 42 U.S.C. § 9607(a)(4).

## II. HISTORY OF THE EPA’S CLEANUP ACTIVITIES IN LIBBY

The roots of this case stretch back nearly a century to the beginning of mining operations in the vicinity of Libby. It was not until the late 1990s, however, that the extent of the problem came to light fully, leading to the EPA’s cleanup action.

### A. ASBESTOS CONTAMINATION IN LIBBY

From the 1920s until 1990, Grace and its predecessors mined and processed vermiculite—a mineral containing a

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<sup>7</sup> The National Priorities List is “the list, compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response.” 40 C.F.R. § 300.5

type of asbestos called tremolite—at a mine approximately seven miles northeast of Libby. *See Grace I* at 1138-41 (describing factual background in an order granting the EPA's motion for summary judgment). Processed ore was trucked to screening plants and expansion/export plants from which the materials were distributed nationwide. Vermiculite was also available for employees to take home for their personal use, and Grace donated vermiculite to the local schools.

Although Grace did not cease mining and processing operations in Libby until 1990, state and federal agencies conducted studies on the health effects of the mining operations as early as the 1940s. These efforts were, however, focused on workplace exposure rather than contamination in the greater Libby community. For example, in the 1940s and 1950s, the Montana State Board of Health issued several industrial hygiene studies to determine whether the mine's operations were detrimental to the employees' health. In 1992, the EPA issued a written determination on the applicability of the National Emissions Standards for Hazardous Air Pollutants to a road on the mine property. However, no CERCLA activities were performed in Libby prior to the EPA's commencement of an investigation in 1999 that led to the current cleanup.

#### **B. THE EPA'S INVOLVEMENT IN LIBBY**

After beginning its investigation in November 1999, the EPA issued a Sampling and Quality Assurance Project Plan in December, followed by a more comprehensive revised plan in January 2000. The plan "address[ed] questions and concerns raised by citizens of Libby regarding possible ongoing exposures to asbestos fibers as a result of historical mining, processing and exportation of asbestos-containing vermiculite." The EPA's immediate efforts were directed toward (1) obtaining information on airborne asbestos levels in order to judge whether a time-critical intervention was needed to protect public health, and (2) obtaining data on friable asbestos levels in potentially contaminated materials

around Libby. The EPA stated that “[t]he first decision to be made is whether or not time-critical intervention is needed to protect public health.”

In his testimony before the Senate’s Environment and Public Works Committee in February 2000, the EPA’s regional administrator attested that the initial investigation confirmed two things: (1) “a large number of current and historic cases of asbestos related diseases centered around Libby,” including “33 incidents of apparently non-occupational exposures”; and (2) a “high likelihood that significant amounts of asbestos contaminated vermiculite still remain in and around Libby.” Vermiculite from the mine’s waste piles was “commonly used by local residents in their yards and gardens as a soil conditioner.” It was also used to create running tracks and baseball fields for nearby schools. The residents were particularly concerned because children regularly played in and around piles of vermiculite. These findings compelled the EPA to undertake more expansive testing. To put it mildly, subsequent testing showed asbestos contamination to be pervasive.

Because asbestos is generally only harmful if inhaled or ingested, the mere presence of asbestos does not necessarily constitute an immediate threat. But the situation in Libby did not present this benign scenario. Instead, the EPA documented “complete human exposure pathways” through which asbestos particles were becoming airborne as a result of normal human activities, such as foot traffic and vacuuming, and natural forces, such as wind—especially during the dry summer months. This migration transformed the latent threat of undisturbed asbestos into a current hazard to anyone breathing the airborne particles. For example, residents described halting baseball games when large dust clouds swept over the field carrying particles from exposed piles of vermiculite. A study of Libby residents conducted in 2000 by the Agency for Toxic Substances and Disease Registry not only found that most participants reported multiple routes of exposure, but also that 18% of those x-rayed had abnormalities in the lining of

their lungs—as compared with the expected rate of 0.2% to 2.3% for groups living in the United States who have no known asbestos exposures.

These findings led the EPA to set out the intended removal action in a series of three memoranda issued between May 2000 and May 2002, which progressively broadened the scope of the cleanup. The original action memorandum, dated May 23, 2000 (“First Action Memo”), covered a former vermiculite export plant and screening plant, the former of which was being used as a retail lumber mill and the latter as a combined commercial/residential property.<sup>8</sup> The First Action Memo authorized a time-critical removal action<sup>9</sup> to be completed by spring/summer 2001 with a total project ceiling of approximately \$5.8 million for the two sites. The EPA determined that the action met the requirements to exceed the \$2 million, 12-month cap because the asbestos in the environment posed an immediate threat to the local population; a cleanup beyond the cap was required to prevent, limit, or mitigate an emergency because of the size of the cleanup and the short construction season; and assistance from other government agencies was not anticipated on a timely basis.

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<sup>8</sup> Grace largely conducted the cleanup of the export plant in response to an EPA order dated May 23, 2000.

<sup>9</sup> The EPA describes the cleanup in Libby as a single removal action both in the action memoranda and its briefs to this court: “EPA authorized *a removal action* to remove asbestos-contaminated materials from hundreds of homes, businesses, yards, gardens, school athletic fields, driveways, and mining plant facilities.” (emphasis added). Likewise, on appeal, Grace argues that the district court erred “by granting the United States summary judgment with respect to the validity of EPA’s characterization of the Libby response action as a removal rather than a remedial action.” Accordingly, we analyze the EPA’s activities in Libby as a single response action rather than a patchwork of discrete smaller actions. *Cf. Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1241 (10th Cir. 2003) (concluding that there can be but one “removal action” per site).

