

No. 05-

IN THE
Supreme Court of the United States

W.R. GRACE & CO., KOOTENAI DEVELOPMENT
CORPORATION, AND W.R. GRACE & CO.-CONN.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred, and created a conflict with the Eighth and Tenth Circuits, by holding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601 *et seq.*, requires a responsible party to pay the entire cost of an environmental response action of potentially unlimited scope and duration, undertaken without any consideration of cost or cost-effectiveness, without being allowed to challenge whether all or part of that action was necessary to contain or abate an immediate environmental hazard.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

Petitioner W.R. Grace & Co. is a publicly held Delaware corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Kootenai Development Corporation is a subsidiary of W.R. Grace & Co., and no other publicly held corporation owns 10% or more of its stock.

Petitioner W.R. Grace & Co.-Conn. is a subsidiary of W.R. Grace & Co., and no other publicly held corporation owns 10% or more of its stock.

Petitioners W.R. Grace & Co., Kootenai Development Corporation, and W.R. Grace & Co.-Conn. filed for Chapter 11 bankruptcy in federal court in Delaware in April 2001, and that proceeding remains pending.

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INTRODUCTION

This case presents the question whether the United States may conduct an environmental response action of unlimited scope and duration under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601 *et seq.*, *without any consideration of cost or cost-effectiveness*, and then present a responsible party with the bill. The Ninth Circuit answered that question in the affirmative, holding that once the Environmental Protection Agency (EPA) determines that any conditions at a particular site create a public health hazard, the EPA is free to spend money at will at that site, even on actions unnecessary to contain or abate the hazard, and then recover that money from a responsible party. That holding turns CERCLA upside down, and conflicts with holdings from the Eighth and Tenth Circuits.

CERCLA creates a fundamental distinction between two types of environmental response actions: “removal” and “remedial” actions. “Removal” actions are short-term, temporary measures necessary to contain or abate an immediate environmental hazard. Precisely because such actions are limited in scope and duration, parties undertaking them need not conduct extensive analysis of cost or cost-effectiveness in order later to recover costs from a responsible party. Indeed, subject to certain narrow exceptions, CERCLA expressly caps “removal” actions undertaken by the United States at \$2 million or 12 months. “Remedial” actions, on the other hand, are long-term measures undertaken as a permanent environmental remedy. They are not limited in either scope or duration, *but* a party undertaking such an action must conduct substantial analysis of cost and cost-effectiveness if it wishes later to recover costs from a responsible party. The statute thus establishes a system of checks-and-balances: removal actions are limited in scope and duration, and hence require only limited procedural safeguards, whereas remedial actions are

unlimited in scope and duration, and hence require substantial procedural safeguards.

The ruling below obliterates this careful scheme. This case involves one of the largest response actions in American history: so far, the EPA has spent more than \$120 million over six years to address asbestos contamination in and around Libby, Montana, and no end is yet in sight. There is no question that CERCLA authorizes the EPA to undertake such an action, and to present responsible parties like petitioners with the bill. But there is also no question that this massive response action is a long-term, permanent effort to restore Libby to its original condition. And therein lies the rub: the EPA has never made any effort to justify the cost or cost-effectiveness of any of its actions in Libby. To the contrary, the EPA has simply thrown money at the problem. The Government obviously may spend its own money as it wishes, but cannot under CERCLA force private parties like petitioners to pay the bill unless it has complied with the relevant procedural safeguards. The EPA has attempted to circumvent those safeguards in this case by asserting that everything done in Libby has been part of a single "removal" action. And the statutory caps on removal actions do not apply, according to the EPA, because everything done in Libby has been part of an *emergency* "removal" action exempt from those caps. The Ninth Circuit held that this was all fine, and affirmed the grant of summary judgment in the EPA's favor with respect to the *entire* Libby response action through the end of 2001.

The upshot of that ruling is that, in the Ninth Circuit, the line between removal and remedial actions under CERCLA is effectively gone. If *this* response action can be characterized as a removal action as a matter of law, then *any* response action can be characterized as a removal action as a matter of law, and there is no more need (or incentive) for the EPA to consider cost or cost-effectiveness when conducting such an action—after all, it

is essentially spending someone else's money. Not surprisingly, the ruling below cannot be reconciled with rulings by other courts of appeals denying cost recovery under CERCLA where a party undertook a remedial action without observing the requisite procedural safeguards, including consideration of cost and cost-effectiveness, required for such actions. *See Public Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1181-82 (10th Cir. 1999); *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024 (8th Cir. 1998).

This Court should grant certiorari to resolve the conflict. Although CERCLA has been on the books for a generation, and has had sweeping effects on American business and society, this Court has never analyzed the statute's fundamental removal/remedial distinction. The time is now ripe for this Court to do so, and to restore CERCLA's formidable cost-recovery authority to its proper statutory bounds.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 429 F.3d 1224, and reprinted in the Appendix (App.) at 1-50a. The district court's decision granting the United States summary judgment is reported at 280 F. Supp. 2d 1135, and reprinted at App. 51-70a. The district court's decision awarding the United States all of the costs requested is reported at 280 F. Supp. 2d 1149, and reprinted at App. 71-138a.

JURISDICTION

The Ninth Circuit rendered its decision on December 1, 2005. App. 1a. On February 15, 2006, Justice Kennedy granted petitioner's application to extend the time within which to file a petition for a writ of certiorari to April 28, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

42 U.S.C. § 9601(23) provides:

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 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(24) provides:

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.

STATEMENT OF THE CASE

A. Background

This case arises out of long-ceased vermiculite mining activities near Libby, a town of some 3,000 residents in northwestern Montana. Vermiculite is not a hazardous

substance; it is a form of mica that, when heated, expands like popcorn, and has a variety of commercial uses (especially insulation). App. 140-41a.¹ Commercial vermiculite mining at Zonolite Mountain, located about ten miles outside of Libby, began in the 1920s; in 1939, the Zonolite Company was formed to mine and process vermiculite at the site. App. 51a. Petitioner W.R. Grace & Co. purchased the Zonolite Company in 1963. *See id.*

Like most naturally-occurring minerals, raw vermiculite contains impurities—foreign substances not wanted in the final, commercial product. Among the impurities associated with vermiculite from Zonolite Mountain is tremolite, a naturally occurring mineral that is present in both asbestos and nonasbestos forms. App. 140a. Asbestos (in contrast to vermiculite) is a hazardous substance within the meaning of CERCLA. App. 72a (citing 42 U.S.C. § 9601(14) and 40 C.F.R. § 302.4). Because asbestos is an impurity in vermiculite, an important part of the production process in Libby focused on separating asbestos and other impurities from vermiculite.

Grace ceased commercial mining operations in Libby in 1990. *Id.* Over the following years, Grace dismantled many of its mining facilities, and began selling off its properties in and around the town. During those years, federal, state, and local authorities were well aware of residual vermiculite in and around the town, but saw no

¹ Because the district court granted summary judgment in the Government's favor, a reviewing court must accept Grace's evidence as true, and draw all reasonable inferences in Grace's favor. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Accordingly, most of the facts set forth in this petition are drawn from Grace's Statement of Genuine Issues of Material Fact filed in opposition to the Government's summary judgment motion. *See* App. 139-84a.

reason for any action. In 1991, Grace sampled the air along the unpaved road leading from the abandoned mine to the Kootenai River for asbestos and submitted the results to local officials. None of the samples contained more than *one-tenth* the then-existing workplace-safety asbestos standard of 0.2 fibers per cubic centimeter. C.A. App. ER41-43. In 1992, the EPA investigated potential asbestos contamination along the road, and concluded that no action was necessary or appropriate. *Id.* at ER44-45; App. 9a. That same year, the Montana Department of Health and Environmental Sciences sampled soil at the former vermiculite export plant on the outskirts of town and concluded that “[n]either sample showed significant asbestos contamination. Therefore the potential site will be considered no further action at this time.” C.A. App. ER1512-14.

Everything changed, however, in late 1999. On November 18—nine years after Grace closed the mine—the *Seattle Post-Intelligencer* began running a series of articles on the health risks from asbestos exposure in Libby. App. 141a. The series asserted that 192 people had died from asbestos-related causes in Libby (“A Town Left to Die”), and charged government agencies with negligence (“While People are Dying, Government Agencies Pass Buck”). The series caused a political firestorm in Montana, and a public-relations crisis for the EPA.

On November 22, 1999—within days of the *Post-Intelligencer* series—the EPA dispatched an investigative team to Libby. App. 141a. In February 2000, the Committee on Environment and Public Works of the United States Senate (which oversees the EPA and its budget, and of which United States Senator Max Baucus of Montana was then the Ranking Member), held a Field Hearing in Libby on “Federal, State, and Local Response to Public Health & Environmental Conditions From Asbestos Contamination in Libby, Montana.” Senator

Baucus presided over that hearing, and EPA officials testified that Libby would be handled as a top priority.

The results of EPA's testing in Libby showed that there was no problem with airborne asbestos at any location in the town or its vicinity. App. 142a. Based on these findings, EPA reassured the community that asbestos did not present a health risk to persons living, working, or visiting the town, and made no efforts to evacuate anyone. App. 141-42a. In March 2000, the EPA's On-Scene Coordinator in Libby, Paul Peronard, stated that "[n]one of the results from the soil, insulation and dust samples point to obvious candidates for cleanup." C.A. App. ER1579; *see also* C.A. App. ER183 ("Test results from area homes, soil, dust and air have thus far shown little for the community to be concerned about," and "[i]f somebody were asking me right now, I would say the ambient air is no problem") (Peronard); C.A. App. ER171 ("Sampling to date does not indicate an ambient air asbestos concentration problem.").

Despite these findings, in May 2000, the EPA issued an "Action Memorandum" memorializing its decision to carry out not only a *removal* action (as opposed to a *remedial* action), but an *emergency* removal action (exempt from CERCLA's 12-month, \$2 million caps on removal actions) at the site of the former screening plant on the banks of the Kootenai River some four miles outside of town. App. 11a.² At that point, the site was owned and occupied by a local couple, the Parkers, who

² The Action Memorandum also memorialized EPA's decision to undertake an emergency removal action at the former export plant site. On the same day the agency issued the Memorandum, however, the agency also issued a Unilateral Administrative Order directing *Grace* to carry out that cleanup. *Grace* did so at its own expense, and costs associated with that project are not at issue here. App. 11a n.8.

had purchased the property from Grace in the mid-1990s for \$126,600. C.A. App. ER1515-17. The Action Memorandum allocated \$4.025 million for remediation work at the site, which (without any analysis of cost or cost-effectiveness) was spent on razing all the buildings, excavating the soil to a depth of up to 13 feet, replacing the soil, and improving the property (*e.g.*, installing step pools for trout and rocks along the river to prevent erosion) *Id.* at ER896-97, ER1021-22, ER1187-88; ER1145-72 (photographs); App. 159-63a.

In July 2001, EPA issued a second Action Memorandum memorializing its decision to expand the Libby response action from the screening plant site to two nearby uninhabited forest areas (the Flyway and the Bluffs), three local schools to which Grace had donated vermiculite and/or other mining materials for outdoor athletic facilities, two residential properties (Siefke and Brownlee) with small piles of vermiculite or contaminated mining equipment on site, and the unpaved road between the mine and the river. App. 12a. The second Action Memorandum raised the ceiling for spending on the Libby response action to over \$20 million, and extended the estimated duration of the project to 34 months. App. 12-13a. Pursuant to the second Action Memorandum, EPA (without any analysis of cost or cost-effectiveness) dug up the soil in the forest at the Flyway and the Bluffs, replaced all the soil, ripped up the athletic facilities at the schools (even though the mining materials donated by Grace had long since been removed or paved over), and engaged in other remedial activities (including buying a new public announcement system and portable popcorn machine for the high school). App. 163-69a; *see also* C.A. App. ER642-51, ER897-912, ER1021-22, ER1653-57.

In May 2002, EPA issued a third Action Memorandum memorializing its decision to expand the Libby removal action yet again, this time to residential properties and businesses throughout the Libby valley. App. 13a. The third Action Memorandum raised the ceiling for spending

