

## New Supreme Court ruling greenlights brownfield development

A ruling last week clears way for redevelopers to sue polluters and recover cleanup costs

Owners and developers of polluted properties in Oregon got a big boost from the U.S. Supreme Court on Tuesday when it ruled private parties that voluntarily clean polluted sites can sue other responsible parties for the costs.

The unanimous decision in *U.S. v. Atlantic Research Corp.* affirmatively answered a significant question that had been lingering after an earlier Supreme Court ruling and now clears the way for owners and developers of what are known as brownfields to redevelop their properties and recover their cleanup costs.

Atlantic Research involves the federal Comprehensive Environmental Response, Compensation and Liability Act, or Superfund law, which holds that anyone who had a connection to a polluted site is responsible for conducting or paying clean-up costs.

Initially, Superfund was considered draconian because it gave the federal Environmental Protection Agency the right to pick one party and hold it responsible for the entire cleanup – even if that party had little involvement in the polluting activities at the site and even if there were other parties that polluted. Faced with such huge potential for liability under Superfund, many people were hesitant to buy and redevelop contaminated properties.

An amendment to Superfund was supposed to ease some of the law's harshness and encourage prompt cleanups by allowing a party that spent money for an environmental cleanup to file a lawsuit to recover some of those costs from other responsible parties. In 2004, however, the Supreme Court interpreted the amendment to mean only parties that had been sued by the EPA or subjected to a formal EPA enforcement process could turn around and sue other responsible parties. This effectively meant someone who voluntarily cleaned up a property without the EPA forcing them to do so was left without a way under Superfund to make others share the costs.

In the three years since that ruling, brownfield owners and developers have faced a dilemma – wait an uncertain period of time for the EPA to formally require a cleanup so that other responsible parties could be sued to contribute or voluntarily clean a site at substantial cost and forego the right to sue others that might have polluted.

In the case just decided by the Supreme Court, Atlantic Research Corp. chose the latter option; it voluntarily cleaned up pollution from retrofitting rocket motors at a site it leased from the federal Department of Defense and then sued the government to recover a share of the cleanup costs. The government relied on the earlier Supreme Court decision to claim Atlantic Research could not use the Superfund law because EPA had not sued Atlantic Research or brought an enforcement proceeding

requiring Atlantic Research to perform the cleanup.

Tuesday's unanimous decision by the Supreme Court rejected the government's position and found a provision in the Superfund law (Section 107(a)) allows private parties to sue other liable parties to recover costs incurred in cleaning up a site



### BROWNFIELD CLEANUP

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without an EPA lawsuit or enforcement action. This confirms Superfund contains an important incentive for brownfield developers – the ability to spread the costs of cleanup among those who actually caused the pollution.

For an owner of a historically polluted site that wants to redevelop it, the decision means he or she no longer has to spend time and money waiting on EPA to order a cleanup so he or she can seek reimbursement from other parties. Instead, the polluted property can be cleaned and redeveloped on the developer's schedule with some assurance the Superfund law will provide a remedy for cost sharing. The decision is also important because it requires the federal government, if liable, to contribute to cleanup costs to the same extent as any other party liable under the Superfund law.

For Oregon developers, the Supreme Court's decision removed a substantial bar to redevelopment by confirming their cost recovery rights under the federal Superfund law in addition to the remedies under Oregon's state cleanup law. Lawsuits to force responsible parties to pay cleanup costs here in Oregon and elsewhere that had been suspended or deferred for the last three years now have a green light to go forward – and that means shovels will start digging again as well.

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