

Waste Management Committee Newsletter

Vol. 7, No. 1

June 2005

CHAIR'S MESSAGE

John Milner

As chair of the ABA Section of Environment, Energy, and Resources' Waste Management Committee, I welcome you to our committee's newsletter. We are striving to provide to you articles that will be informative, timely and useful in your legal practice.

Our committee is still new in the Section. Essentially, the committee's "jurisdictional scope" can be summarized as issues related to federal RCRA Subtitle C (hazardous waste management) and Subtitle D (non-hazardous solid waste management) and the states' programs regulating hazardous and solid waste management.

We want and need your participation in the committee's activities. Important activities we would like you to consider include writing articles for the committee newsletter and proposing topics for committee "brownbag" teleconferences. If you would like to get involved in these or other committee activities, please contact me at jmilner@brunini.com or (601) 960-6842.

I hope that you will join us in accomplishing our mission to provide to our Section members and prospective members important, timely and useful information on issues relating to hazardous waste and solid waste regulatory management.

DUE DILIGENCE ASSESSMENTS OF REAL PROPERTY: NEW STANDARDS CREATED BY THE PROPOSED "ALL APPROPRIATE INQUIRY" RULE

Kristina G. Nelson

On Aug. 26, 2004, the Environmental Protection Agency (EPA) issued notice of its proposed rule that will set federal standards and practices for conducting "all appropriate inquiry" as required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The proposed rule, like the Phase I environmental site assessment, is intended to define the minimum threshold assessment of real property in order to determine whether environmental contamination exists that would give rise to CERCLA liability.

Background on "All Appropriate Inquiry"

Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Amendments) to clarify the innocent landowner defense in CERCLA and set forth two new exemptions to CERCLA liability for bona fide prospective purchasers and contiguous landowners. The CERCLA "innocent purchaser" defense applies only if the purchaser of previously contaminated property, prior to the time of acquisition, "did not know and had no reason to know" that the hazardous substance was disposed on the property. The "contiguous landowner" defense is available to owners of land contaminated by

**Waste Management
Committee Newsletter
Vol. 7, No. 1, June 2005
George L. Seay, Jr., Editor**

In this issue:

Chair's Message
John Milner 1

Due Diligence Assessments of Real
Property: New Standards Created by the
Proposed "All Appropriate Inquiry" Rule
Kristina G. Nelson 1

Nevada Courts Exclude Construction
Debris from Solid Waste Collection
Franchises
David Biderman 5

Solid Waste Franchises – Update on the
New Battleground in Flow Control
Stephen D. Mossman 7

Cooper Industries v. Aviall Services, Inc.:
What Does It All Mean?
George L. Seay, Jr. 9

© 2005. American Bar Association. All rights reserved.
The views expressed herein have not been approved
by the ABA House of Delegates or the Board of
Governors and, accordingly should not be construed
as representing the policy of the ABA.

This newsletter is a publication of the ABA Section of
Environment, Energy, and Resources, and reports on
the activities of the committee. All persons interested
in joining the Section or one of its committees should
contact the Section of Environment, Energy, and
Resources, American Bar Association,
321 N. Clark St., Chicago, IL 60610.



a release on adjacent or contiguous property. Unlike the "innocent landowner" and "contiguous landowner" defenses, the "prospective purchaser" defense attaches even if the purchaser knew of the contamination at the site.

In order to qualify for one of these defenses, the party must have 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." Congress directed EPA to issue regulations defining what constitutes "all appropriate inquiry" by Jan. 11, 2004. Currently, parties may use either the American Society of Testing Materials' 1997 or 2000 Phase I Environmental Site Assessment Process (ASTM Phase I standard) in order to comply with the "all appropriate inquiry" requirement for purchases that took place after May 31, 1997 and before EPA revises its standard. After EPA finalizes this standard, purchasers will be required to meet it rather than having the option of conducting an ASTM Phase I or other comparable assessment. Summarized below are the key provisions of the proposed all appropriate inquiry rule, focusing on the differences between the previous ASTM Phase I standard and the proposed rule.

Summary of the Proposed Rule

Overview of the Proposed "All Appropriate Inquiry" Rule

EPA initiated a negotiated rulemaking process to develop the "all appropriate inquiry" standard and formed a Negotiated Rulemaking Committee composed of representatives from the development, real estate and banking industries; environmental and public interest groups; state, local and tribal governments; environmental assessment companies and EPA. Compared to the previously adopted ASTM Phase I standard, the proposed "all appropriate inquiry" rule will require a broader scope of environmental inquiry and is estimated to cost slightly more than the previous ASTM Phase I site assessment. Under the proposed rule, all appropriate inquiry must include the following elements:

- Interviews with past and present owners, operators and occupants;
- A review of historical sources of information, such as aerial photographs, fire insurance maps, building department records, chain of title documents and land use records;
- A review of government records for both the subject property and nearby and adjoining properties;
- Visual inspections of the subject property and adjoining properties;
- Search for recorded environmental cleanup liens;
- Consideration of commonly known or reasonably ascertainable information within the local community about the property as learned during the all appropriate inquiry process;
- Consideration of the degree of obviousness of the presence of releases or threatened releases;
- Consideration of specialized knowledge or experience of the subject property, the area surrounding the property or adjoining properties on the part of the defendant or the environmental professional;
- Consideration of the relationship of the purchase price to the value of the property, if the property was not contaminated.

The proposed rule requires a written report that contains the environmental professional's opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances. The report should also contain an identification of any data gaps and the effect on the environmental professional's ability to provide an opinion. Data gaps are defined as the inability to obtain information required by the standards and practices listed in the proposed rule, despite good faith efforts by the environmental professional or prospective landowner. The proposed rule points out that data gaps may be addressed by sampling and analysis; however, environmental sampling and analysis is not a requirement *per se* for all appropriate inquiry.

Under certain conditions, the proposed rule would allow parties conducting an "all appropriate inquiry"

investigation to use a previous inquiry completed for the same property. The previous inquiry must have been conducted in compliance with the regulations applicable when the previous inquiry was completed. Also, the previous inquiry must have been completed with information that was collected no longer than one year prior to the current date of acquisition of the property. Additionally, specific components of the inquiry made more than six months prior to the current date of purchase of the subject property must be updated.

Differences Between the ASTM Phase I Standard and EPA's Proposed "All Appropriate Inquiry" Rule

EPA's all appropriate inquiry standard is based upon a list of statutory criteria, several of which are not part of the ASTM Phase I assessment, such as the specialized knowledge or experience of the purchaser and the relationship of the purchase price to the value of the property if the property was not contaminated. EPA considered using the ASTM Phase I standard for the federal standard for all appropriate inquiry; however, it concluded that the ASTM Phase I standard failed to adequately address these statutory criteria. While there are many similarities between the proposed rule and the ASTM Phase I standard, the proposed rule deviates from the old ASTM Phase I standard potentially effecting the environmental due diligence process for real estate transactions.

The ASTM Phase I standard requires that the environmental professional conduct interviews with the current owner and occupants of the subject property, and with at least one staff member of any one of the listed local governmental agencies. Although the proposed rule does not specifically require an interview with a local or state government official like the ASTM Phase I standard, the proposed rule requires interviews with a more expansive number of individuals. In addition to interviewing the owner or occupant of the property, the inquiry should include interviewing one or more of the following: (1) the current and past facility managers; (2) past owners, occupants or operators of the subject property; or (3) employees of current and past occupants of the subject property. In the case of

more than one owner or occupant, the rule requires an interview with the major occupants and those occupants that were likely to use, store, treat, handle or dispose of hazardous substances. Furthermore, interviews conducted at “abandoned properties,” which is defined as “a property that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current owner to surrender rights to the property,” *must* be conducted with one or more of the owners or occupants of the neighboring or nearby properties from which it appears possible to have observed uses of or releases at the abandoned property.

The proposed rule also diverges from the ASTM Phase I standard in its review of historical sources. The first difference is the timeframe for review of the historical sources. The Phase I standard requires identification of all obvious uses of the property from the present back to the property’s first developed use, or back to 1940, whichever is earlier. In the proposed rule, the environmental professional is required to review historical documents for a period of time as far back in the history of the property as it can be shown that the property contained structures, or from the time the property was first used for residential, agricultural, commercial, industrial or government purposes. For example, if the subject property was undeveloped prior to 1970, under the ASTM Phase I standard, the environmental professional would still be required to research the past uses of the property back to 1940. Under the proposed standard, the research would only need to go back to 1970. Furthermore, the proposed rule requires the environmental professional to document any “data gaps” if a search of historical information fails to reveal the previous uses and occupancies of the property and such information cannot be obtained through other inquiries.

A review of numerous federal, state, tribal and local government records of the subject property and adjoining properties is required by the proposed rule. Under the ASTM Phase I standard, the decision to review local land use records was left to the environmental professional’s discretion. The proposed

rule goes beyond the current ASTM Phase I practice and specifically requires a review of lists of engineering and institutional controls for the subject property and, in certain circumstances, any property within one-half mile of the subject property.

Both the ASTM Phase I standard and the proposed rule on all appropriate inquiry require the environmental professional to make an on-site visual inspection of the subject property; including a visual on-site inspection of the facilities and any improvements on the property, and a visual inspection of the areas where hazardous substances may be or may have been used, stored, treated, handled or disposed. The proposed rule also requires a visual inspection of adjoining properties, from the subject property line, public rights-of-way or other vantage point. In contrast, under the ASTM Phase I standard, the environmental professional is to note the uses of adjoining properties, but only to the extent that such uses are visually observed during the inspection of the subject property.

The definition of environmental professional in the proposed rule allows only those who have sufficient education, federal or state licensing or real world experience to conduct the all appropriate inquiry. There was disagreement over whether practical experience or a professional degree or some combination of both was the necessary measure of a consultant’s qualifications. The proposed rule requires that an “environmental professional” possess “sufficient education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases . . . to the surface or subsurface of a property, sufficient to meet the objectives and performance factors” provided in the proposed regulation. To ensure at least some level of accountability, the environmental professional must sign a statement that the rule’s professional criteria were met.

The proposed rule allows a person who does not qualify as an environmental professional to assist in the performance of the all appropriate inquiry assessment so long as one member of the team meets the definition of an environmental professional and reviews the

results and conclusions of the inquiries and signs the final report. In the preamble to the proposed rule, however, EPA recommends that the visual inspections of the subject property and adjoining properties be conducted by an individual who meets the regulatory definition of an environmental professional. EPA believes that this individual is best qualified to interpret information regarding the physical and geological characteristics of the property as well as information on the location and condition of equipment and other resources on the property.

The proposed all appropriate inquiry rule will result in a more thorough investigation into past uses and occupancies of property and potential sources of releases of hazardous substances that could affect such property. Purchasers of property must be aware of the EPA's decision not to use the ASTM Phase I standard and understand where the proposed rule deviates from the previous ASTM Phase I standard. Once the rule is effective, if a purchaser wishes to purchase property and take advantage of one of CERCLA's defenses, he or she will be required to follow the new standards of "all appropriate inquiry."

NEVADA COURTS EXCLUDE CONSTRUCTION DEBRIS FROM SOLID WASTE COLLECTION FRANCHISES

David Biderman

Two Nevada state courts have recently issued decisions limiting the scope of exclusive solid waste collection franchises. In both decisions, the court concluded that because construction and demolition debris (C&D) does not pose a health threat, it is beyond the police power of local governmental authorities, under Nevada law, to include C&D within the scope of an exclusive solid waste collection franchise.

Although both decisions raise similar issues, the more recent decision in *Douglas Disposal, Inc. v. Wee Haul, LLC*, No. 03-0298 (9th Dist. Douglas Cty. Jan. 20, 2005) contains a far more expansive analysis of the issues, and is the focus of this article. In this case, Douglas County entered into a franchise agreement with Douglas Disposal Inc. (DDI) in 1996. The agreement granted DDI the exclusive right to collect all solid waste within East Fork Township.

In 2003, DDI filed a lawsuit against Wee Haul, LLC and NJ Enterprises, Inc, two competing C&D haulers. The lawsuit sought injunctive relief and damages, alleging that each company collected solid waste within DDI's exclusive franchise area, through debris collection boxes at construction sites for C&D. DDI argued Nevada law, which defines "solid waste" broadly to include "nonputrescible refuse" including "demolition waste" and "construction waste" supports its position that C&D waste falls within the exclusive franchise granted to DDI. The defendants argued that because C&D waste is non-putrescible, it does not pose a health or safety issue and is therefore outside the police powers of Douglas County. It further argued the restriction violates the Commerce Clause and should be declared unconstitutional.

Siding with the defendants on the franchise issue, the court concluded Douglas County exceeded its authority by including "non-putrescible construction debris" within the scope of its franchise agreement with



Waste Management
Committee Newsletter

LIKE TO WRITE?

The Waste Management Committee welcome the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor George Seay at gseay@wyattfirm.com or (502) 223-2104.

DDI. The court observed that the police power could be legitimately exercised for the purpose of improving public health, safety and the general welfare. Citing a 1975 Utah Supreme Court case that limited the scope of a similar exclusive franchise, the court concluded “non-putrescible construction debris is not injurious to the public health, and therefore falls outside the County’s police power to include in a waste hauling exclusive franchise agreement.” The court added “there is no indication that when the Nevada Legislature granted the authority to displace competition . . . it intended to include all types of solid waste, namely construction debris. . . .” Thus, the court ruled unconstitutional Nevada Revised Statutes 244.187(3) to the extent the phrase “other waste” in that provision includes construction debris.

On the Commerce Clause issue, the court found that Nevada law and the DDI franchise agreement with Douglas County do not discriminate against interstate commerce in favor of local businesses. Applying the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) balancing test, the court concluded the burden imposed by excluding defendants from hauling C&D debris is clearly excessive when balanced against the intended local benefit. In so holding, the court expressed its disagreement with a federal appeals court decision from 1997 concerning an exclusive franchise for refuse collection in certain portions of Washoe County, Nevada. *See Individuals for Responsible Gov’t v. Washoe County*, 110 F.3d 699 (9th Cir. 1997).

The *Douglas Disposal* decision marks the second successful challenge to a Nevada exclusive franchise in the past few months. In *Independent Sanitation Co. v. Empire Contractors, LLC*, No. 03-03852 (2d Dist. Washoe Cty. Dec. 2, 2004), another Nevada state judge similarly excluded C&D from an exclusive solid waste franchise. The *Douglas Disposal* decision contains a much more detailed explanation and analysis of the court’s reasoning than the *Independent Sanitation* decision. Interestingly, the *Douglas Disposal* court’s *Pike* analysis did not precisely describe either what the “burden” on interstate commerce was, or what “benefit” was alleged by DDI.

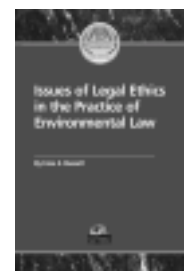
The court’s review of the franchise issue appears to turn on the intent of the Nevada legislature and a 30-

year old Utah decision. If the trial court decision is affirmed on appeal, the state legislature could, potentially, clarify whether its authorization to local governmental entities to establish waste franchises encompasses C&D.

Although these cases were decided under Nevada law, they raise important national issues concerning whether exclusive franchises encompass C&D waste. Many local governments grant exclusive franchises, for a variety of reasons, to companies for some or the entire overall waste stream generated by businesses and residents. These franchises sometimes go beyond “residential” waste or “commercial” waste and include C&D. Some companies seek to avoid the franchise by arguing they are “recycling” C&D material, and are therefore not subject to it. A few years ago, a C&D collection company argued in a series of cases, ultimately unsuccessfully, that a federal transportation law preempted certain waste franchises in Oregon because the waste material at issue was considered “property” under that federal law. *See A.G.G. Enterprises, Inc. v. Washington Cty.*, 281 F.3d 1324 (9th Cir. 2002); *Woodfeathers v. Washington Cty.*, 180 F.3d 1017 (9th Cir. 1999). There is litigation pending in the 11th Circuit concerning whether a Florida municipality’s exclusive waste franchise encompasses C&D material, although the lower court decision in that case turned on Commerce Clause and not police power grounds.

Because franchises are often financially lucrative to the franchisee, and often reflect an economic and political decision made by local governmental officials, continued litigation over the scope of such franchises between competing haulers, and between haulers and local governments, can be expected.

Visit
www.ababooks.org
to learn about books
from the Section
and ABA Publishing



SOLID WASTE FRANCHISES – UPDATE ON THE NEW BATTLEGROUND IN FLOW CONTROL

Stephen D. Mossman

In the August 2004, issue of the Waste Management Committee Newsletter, I wrote on the topic of franchises and flow control. Since that issue went to press, there have been some developments of note in the cases that I wrote about and much more activity arising out of the state of Nevada in this area of the law.

In *Southern Waste Systems, LLC v. City of Delray Beach, Fl.*, United States District Court, Southern District of Florida, West Palm Beach, Opinion Filed April 29, 2004, United States District Judge Kenneth L. Ryskamp granted partial summary judgment finding a commerce clause violation. The case was brought by Southern Waste which was in the business of hauling construction and demolition debris (C&D) in the city of Delray Beach. The city awarded by ordinance an exclusive franchise for the collection of solid waste, vegetative waste and recycling collection services to BFI Waste Systems of North America which was later sold to Waste Management, Inc. The court concluded that the franchise agreement and ordinance were in violation of the Commerce Clause as they pertained to the collection of C&D and enjoined the city from enforcing the C&D portions of the franchise and ordinance. Following the grant of partial summary judgment, the city appealed the opinion to the 11th Circuit Court of Appeals. No decision has been rendered by the 11th Circuit.

In *Barker Sanitation v. City of Nebraska City, Nebraska*, 2004 U.S. App. LEXIS 12836 (2004) the 8th Circuit Court of Appeals affirmed a district court decision challenging an exclusive solid waste franchise. The district court rejected Barker Sanitation's arguments that the ordinance and franchise agreement violated the Commerce Clause on its face, through its effects or because it was adopted for a discriminatory purpose. The court then analyzed the scheme under the well known *Pike v. Bruce Church, Inc.*, 397 U.S.137 (1970) benefits v. burdens test. With respect

to the burden on interstate commerce, the court held, "It is difficult to detect what burden on interstate commerce is imposed by the Ordinance in this case when the Ordinance does not prohibit [the hauler] from taking Nebraska City waste to any in-state or out-of-state transfer facility or landfill (so long as it is a licensed subtitle D landfill disposal facility) and when the Ordinance in no way restricts out-of-state waste from being brought to, and processed in, the Nebraska City Transfer Station." The court outlined numerous local benefits concluding that the local benefits outweighed any "incidental burden the Ordinance and associated agreements impose upon interstate commerce".

On appeal to the 8th Circuit, Barker Sanitation continued to advance its arguments that the ordinance was adopted for the purpose of economic protectionism and through its effect of preventing out-of-state companies from being able to compete for the processing of solid waste in Nebraska City. The 8th Circuit held, "Because we have nothing to add to the district court's analysis, we affirm without extended discussion."

Following this rebuff by the 8th Circuit, Barker Sanitation filed a Petition for Writ of Certiorari to the U.S. Supreme Court. In its Petition, Barker Sanitation argued primarily that the 8th Circuit's opinion conflicted with *C & A Carbone, Inc. v. Town of Clarkston, New York*, 511 U.S. 383 (1994). On Nov. 29, 2004, the Supreme Court denied the Petition without comment.

In Nevada, the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas, recently held that Douglas County could not prohibit the hauling of construction debris by non-franchise haulers in *Douglas Disposal, Inc. v. Wee Haul, LLC, etal.*, Memorandum of Decision filed Jan. 20, 2005. The court relied on both Nevada statute and the dormant commerce clause in arriving at its decision. First, the court found that when the Nevada Legislature granted municipalities the authority to displace competition for the collection of garbage and other waste, there was no indication that it intended to include construction debris. Second, the court found

that non-putrescible construction debris is not injurious to the public health. Finally, the court found that under the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the burden imposed by excluding non-franchise haulers from hauling construction debris is clearly excessive when balanced against the intended local benefit.

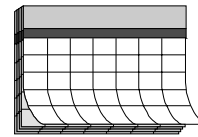
The *Douglas Disposal* decision was consistent with another state judicial district decision in Nevada which found that there was no evidence that the collection and disposal of construction waste presented a health and safety hazard (in the Second Judicial District of the State of Nevada in and for the County of Washoe, *Independent Sanitation Company v. Empire Contractors, LLC*, Findings of Fact, Conclusions of Law and Judgment, filed Dec. 2, 2004). Relying on *Huish Detergents, Inc. v. Warren County, Kentucky*, 214 F.3d 707 (6th Cir. 2000), the court found that a public entity could only exclude other parties from entering into contracts if the exercise of governmental authority is based upon the exercise of the public entity's police powers. The court concluded that there is no reason that would justify the exclusive franchise agreement to the collection and disposal of construction waste. Nevada news reports indicate that there are several other cases pending in Nevada challenging exclusive franchise agreements for solid waste.

The recent decisions in this area of the law should provide a cautionary note to public entities to make certain that any franchise agreement explicitly includes construction and demolition waste (if that is their intent). Public entities also need to be certain that the franchise agreements are consistent with the definitions found, and the powers granted, in their statutory enabling acts. Finally, public entities need to develop a sufficient record to show that granting an exclusive franchise is based upon non-discriminatory factors.

Stephen D. Mossman is the Programs vice chair for the ABA Section of Environment, Energy, and Resources' Waste Management Committee. He is a partner in the Lincoln, Nebraska, firm of Mattson, Ricketts, Davies, Stewart and Calkins.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



Wetlands Law and Regulation

June 8-10, 2005

Washington, D.C.

(Cosponsored with ALI-ABA and ELI, for information see www.ali-aba.org.)

ABA Annual Meeting

Aug. 4-9, 2005

Chicago

13th Section Fall Meeting

Sept. 21-25, 2005

Nashville, Tennessee

24th Annual Water Law Conference

Feb. 24-25, 2006

San Diego, California

35th Annual Conference on Environmental Law

March 9-12, 2006

Keystone, Colorado

***For more information, see the
Section Web site at
<http://www.abanet.org/environ>
or contact the Section at 312/988-5724.***

**COOPER INDUSTRIES V. AVIALL
SERVICES, INC.
WHAT DOES IT MEAN?**

George L. Seay, Jr.

In December 2004, the U.S. Supreme Court issued one of the most significant decisions in recent history relating to the Comprehensive Environmental Response Compensation Liability Act, as amended, (CERCLA), *Cooper Industries, Inc. v. Aviall Services, Inc.*, 124 S.Ct. 577 (2004)(*Aviall*). The Court ruled that a private party who has not been the subject of a prior civil action under §106 or §107 of CERCLA may not bring a contribution action under §113 of CERCLA against other potentially responsible parties (PRPs). This decision effectively, and specifically, limits the right to contribution of a party who voluntarily begins the cleanup of contaminated sites.

It has often been argued that this right of contribution is one of the mainstays of the voluntary cleanup program. In fact, 23 states, as well as environmental groups and industry representatives, filed Friend of the Court briefs supporting the proposition that Sections 106, 107, and 113 of CERCLA could and should be read concurrently to allow cost recovery claims for voluntary remediations.

The law has developed over the past years to allow potentially responsible parties (PRPs) to pursue CERCLA §113 claims against other potentially liable parties for clean up costs incurred. *Aviall* has now substantially limited those rights.

Aviall Services purchased an aircraft engine maintenance business in 1981 from Cooper Industries. Subsequently, it was discovered that certain solvent petroleum related contamination existed at those purchased sites. After the Texas Natural Resource Conservation Commission directed Aviall to begin remediation of the contaminated sites, but prior to the institution of any state or federal enforcement action, Aviall began the remediation process incurring cleanup costs of several million dollars.

Thereafter, Aviall Services sought contribution against Cooper Industries pursuant to CERCLA §113(f)(1)

for recovery of its cleanup costs. The trial court dismissed all the claims stating that CERCLA §113(f)(1) would not support such a claim unless there had been a prior administrative order from the U.S. Environmental Protection Agency under CERCLA §106 or the plaintiff had been named as a party in a cost recovery action pursuant to CERCLA §107. The trial court's decision was initially affirmed by a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit. However, after an *en banc* hearing of the Fifth Circuit Court of Appeals, the judgment of the three-judge panel was reversed and Fifth Circuit Court of Appeals found that the lower court's ruling was contrary to public goals and the federal superfund law.

The Supreme Court's decision rendered on Dec. 13, 2004, reversed the Fifth Circuit in a 7-2 decision.

The Court examined what it termed the plain language of the statutory text and "found that the enabling clause authorizes certain contribution actions...and no others." The Court found that the savings clause contained in §113 of CERCLA does not expand §113(f)(1) to authorize contribution actions to be brought pursuant to §106 or §107.

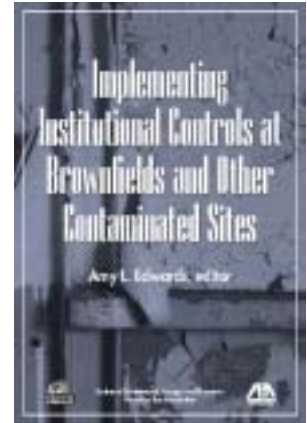
Interestingly, however, the Supreme Court specifically did not address the question of whether a private party may bring a §107 action to recover costs when neither a state or federal enforcement action is pending.

This decision will have a wide ranging effect on how cleanup activities will be conducted in the future. Parties who wish to proceed with characterization or remediation will have to find alternate avenues to pursue contribution from other PRP's absent federal or state judicial or administrative action. This may require negotiation of federal or state orders, actions under separate state waste or remediation statutes or actions pursuant to general state contributory liability theories. Whatever the new avenue, it is clear that "business as usual" in the area of CERCLA contribution will no longer be the order of the day.

Implementing Institutional Controls at Brownfields and Other Contaminated Sites

Amy L. Edwards, editor

The critical role of institutional controls in brownfields cleanups has recently been highlighted by the 2001 Brownfields Amendments, and as a result a key element in the future success of brownfields redevelopment will rest on understanding and using risk-based corrective action, including institutional and engineering controls. ***Implementing Institutional Controls at Brownfields and Other Contaminated Sites***, the first book on this important and evolving topic, provides a grounding in the history and current use of institutional controls. Emphasizing federal, state and public perspectives, this compendium of articles written by over 43 experts in the field offers real estate and environmental practitioners a state-of-the-art review of a subject that is integral to the success and growth of brownfields redevelopment projects.



Beginning with an overview of institutional controls, Part I examines some of the emerging tools that can be used in brownfields redevelopment, including custodial trusts, one-call systems, and web-based tracking systems, and discusses the benefits of the proposed uniform model law on environmental covenants (UECA). Part II addresses the federal perspective, including the statutory and regulatory framework for the use of institutional controls in CERCLA and RCRA. The state perspective is covered in Part III, looking at the varying use of these controls in several states. "Experience in the Field" is the focus of Part IV, which reviews how these controls have been used, highlights recent case studies, and draws conclusions on what can be learned from these successes and failures. The appendices provides quick, one-source access to relevant documents and forms, including the flow chart from the ASTM *Standard Guide on the Use of Activity and Use Limitations, Including Institutional and Engineering Controls* (E 2091), final fact sheets from the EPA for site managers at Superfund and RCRA sites, guidance from the Dept. of Defense, and state documents referenced in the text.

2003 7 x 10 803 pages

Product Code: 5350098

Price: Section of Environment, Energy, and Resources members \$135.95; Regular \$149.95

**TO ORDER ABA BOOKS, CALL 1-800-285-2221 OR
VISIT THE ABA PUBLISHING
WEB SITE AT WWW.ABABOOKS.ORG**