



Superfund and Hazardous Waste Committee Newsletter

Vol. 4, No. 1

January 2003

GREETINGS FROM THE CHAIR

Jeffrey Pollock

Welcome to a new year for the Superfund and Hazardous Waste Committee! We hope to arrange for at least three more newsletters over the next nine months. On behalf of David Platt (dplatt@murthalaw.com) and Bruce Howard (bruce.howard@lw.com), two of the vice-Chairs of the Committee and the co-editors of this newsletter, I invite you to submit articles suitable for the Committee's newsletter. This edition of the newsletter covers areas ranging from 1) *United States v. Power Engineering Co.*, the continuing consequences of the Eighth Circuit's decision in *Harmon Industries v. Browner*; 2) public service opportunities for Superfund and Hazardous Waste practitioners; 3) the Fifth Circuit's recent *en banc* decision in *Aviall Services, Inc. v. Cooper Industries, Inc.* affecting cost recovery actions; and, *inter alia*, 4) an overview of developments stemming from the enactment of the Small Business Liability Relief and Brownfields Revitalization Act.

As you review the newsletter and anticipate what professional activities you will work on over the coming year, please consider that the Superfund and Hazardous Waste Committee provides you not only with informative materials but also with the opportunity to participate and advance professionally. Every member of

our Committee is welcome to participate in making this Committee a success. In addition to looking for articles, we are constantly searching for programs, teleconferences, and brownbag lunches that will address issues of concern to Superfund and hazardous waste practitioners. For example, we are currently working on the rough outline of a roundtable discussion planned tentatively for Spring 2003 to address the many guidance documents being issued by USEPA in response to the Small Liability Relief and Brownfields Revitalization Act. Participation can even be as simple as attending one of the Committee sponsored programs throughout the year – much of what we each gain from this Committee is the opportunity to share thoughts and concerns informally with each other at Section programs.

Over the coming months, this Committee will also be an active participant in the 32nd Annual Conference on Environmental Law in Keystone, Colorado (March 13-16, 2003), and the ABA Annual Meeting in San Francisco (Aug. 7 -13, 2003). In addition, we are currently working jointly with the In-House Counsel and the Environmental Transactions, Audits, & Brownfields Committees on developing teleconferences to address issues of concern to our members. If you wish to participate in any of these programs, in the Committee newsletter, *Trends* (the Section newsletter), *The Year in Review* (a compen-

**Superfund and Hazardous Waste
Committee Newsletter
Vol. 4, No. 1, January 2003**

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dium provided to all Section members), Natural Resources & Environment (the Section's quarterly magazine), or in any activities of the Superfund and Hazardous Waste Committee please contact me (jpollock@sillscummis.com; 973/643-5251) or any of the Committee vice-chairs. We look forward to working with you over the coming year.

**THE TENTH CIRCUIT'S POWER
ENGINEERING DECISION: PARTING
COMPANY WITH *HARMON*, TENTH
CIRCUIT UPHOLDS EPA "OVERFILING"
AUTHORITY UNDER RCRA**

Scott M. DuBoff

The Tenth Circuit's Sept. 4, 2002 ruling in *United States v. Power Engineering Co., et al.*, 303 F.3d 1232 (10th Cir. 2002), upholds the U.S. Environmental Protection Agency's so-called "overfiling" authority for enforcement of the Resource Conservation and Recovery Act (RCRA) where a state with delegated authority to administer the RCRA program has already initiated its own enforcement action concerning the same matters. Affirming a Colorado federal district court, the Tenth Circuit's September 4 ruling directly conflicts with the Eighth Circuit's *Harmon* decision, *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999).

Power Engineering's facts are straight forward. The state agency involved, the Colorado Department of Public Health and Environment (CDPHE), has EPA-delegated authority to administer RCRA's hazardous waste management (Subtitle C) program in the state (RCRA provides that such management responsibility for solid and hazardous waste is "primarily the function of State, regional, and local agencies" and places "high priority" on "full authorization of State programs"). See 42 U.S.C. §§

6901(a)(4) and 6902(a)(7). Following an investigation, CDPHE concluded that Power Engineering had violated various hazardous waste management standards at its Denver electroplating facility. As a result, CDPHE initiated a state court civil action against Power Engineering seeking various forms of injunctive relief to remedy those violations as well as assessment of a \$1.13 million civil penalty. The CDPHE had also exercised its discretion not to require another remedial measure – financial assurance (*i.e.*, contingent funding) for possible future cleanup work. See 6 Colo. Code Regs. 1007-3 Section 266. After the CDPHE had filed its state court action against Power Engineering, EPA filed an identical suit in federal court (as initially filed EPA's suit differed only in the penalty demand – \$1.88 million rather than CDPHE's \$1.13 million). EPA subsequently amended its complaint, adding a claim for the financial assurance mechanism that CDPHE had not sought and withdrawing all other claims against Power Engineering.

The two principal statutes at issue in *Power Engineering* are RCRA Sections 3006(b) and (d), 42 U.S.C. §§ 6926(b) and (d). They provide, respectively, that (i) a RCRA-delegated state “is authorized to carry out [its RCRA] program in lieu of the Federal program . . . in such State and to issue and enforce [hazardous waste] permits” and (ii) “[a]ny action taken by a State under [that] program . . . shall have the same force and effect as action taken by” EPA. The other RCRA provision pertinent to the case was 42 U.S.C. § 6928(a)(2), which authorizes federal enforcement in specific cases following notice to the affected state. The Tenth Circuit preceded its discussion of these statutes by noting their interrelationship to each other and ambiguity; given that ambiguity, the court said it would defer to EPA's “reasonable” interpretation. [Although a complete discussion would go beyond the scope of this paper, a counterpoint to the suggestion of

such deference is the fact that EPA's position on overfiling was announced in an enforcement guidance memorandum; statutory interpretations contained in such enforcement guidelines are not entitled to *Chevron* deference. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). In addition, EPA rulings concerning RCRA overfiling authority have been inconsistent. See *e.g., In re BKK Corp.*, 2 E.A.D. 35, 1985 WL 57139, at *3 (EPA Chief Judicial Officer, May 10, 1985), *vacated on other grounds*, 2 E.A.D. 93, 1985 WL 57150 (EPA Administrator, Oct. 23, 1985) (“EPA cannot take enforcement action for RCRA violations in the face of reasonable and appropriate enforcement action for the same violations by an authorized state”). Such inconsistency also counsels against special deference. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 n.30 (1987).]

The Tenth Circuit turned initially to Section 6926(b)'s “in lieu of” proviso and accepted EPA's argument that the provision applies to a delegated state's RCRA program other than the state's enforcement of its program. The court's rationale: the “in lieu of” proviso appears in Section 6926(b)'s state program clause and does not modify the next clause which refers to state enforcement. 303 F.3d at 1237-39. Although not addressed by the Tenth Circuit, various RCRA provisions clearly state that enforcement is an integral component of the “program” to which Section 6926(b) refers. For example, Section 3006(b)'s introductory clause provides that a state may “seek[] to administer and enforce a hazardous waste program” (emphasis added). The statute further explains that enforcement is an integral component of the state “program,” and that “such program [must] provide adequate enforcement of compliance.” See also *Harmon*, 191 F.3d at 900 (“Issuance [of permits] and enforcement are two of the functions authorized as part of the state's

hazardous waste enforcement program under the RCRA”).

The court then turned to Section 6926(d) which, as noted above, provides that any action taken by a state under its delegated RCRA program has the “same force and effect” as federal action in a non-delegated state. Although the Eighth Circuit concluded in *Harmon* that Section 6926(d) applies to enforcement as well as permit issuance, the Tenth Circuit disagreed. It reasoned that section 6926(d) “must be read in the context of the language and design of the statute as a whole” in which Section 6926 focuses on authorization of state programs and federal enforcement is addressed in Section 6928. See 303 F.3d at 1239 (it should be noted that in an earlier case the Tenth Circuit interpreted section 6926(d) quite differently, suggesting that because EPA had authorized Colorado to enforce its hazardous waste program in lieu of EPA enforcement of RCRA, “[a]ny action taken by [Colorado] . . . [has] the same force and effect as action taken by the [EPA]”). See *United States v. State of Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993).

While EPA has defended its overfiling policy on the basis, among others, that overfiling is infrequent, see Brief of United States, *United States v. Power Engineering Co.*, United States Court of Appeals for the Tenth Circuit, Case No. 01-1217, at 36, limiting the use of a counterproductive regulatory policy does not neutralize its adverse impact. In that regard, earlier EPA decisions recognized RCRA’s emphasis on federalism, noting that “Congress envisioned that those closest to the problem should have the right to weigh [their] options and choose that course of action most likely to result in the desired goal.” *In re Martin Electronics, Inc.*, No. RCRA 84-45-R, 1986 RCRA LEXIS 35, at *10 (EPA Jan. 14, 1986) (decision on motion to reconsider), *vacated on other grounds*, 1987 EPA App. LEXIS 6 (June 22, 1987). Put another way,

the enforcement strategy adopted by one segment of government will not always be identical to that which another may choose. That does not mean that one is right and the other is wrong; it merely says that there is usually more than one viable approach to solving a problem.

Id. Simply put, it is inevitable that different regulators will at times perceive the appropriate enforcement strategy for a given case in different ways. The discretion to make such choices is a necessary aspect of authorized-state RCRA programs.

Although Power Engineering did not request rehearing concerning the Tenth Circuit’s September 4 ruling, the RCRA overfiling issue presented in the *Harmon* and *Power Engineering* cases remains controversial, and recent reports indicate that a petition for a writ of certiorari requesting Supreme Court review of the Tenth Circuit’s decision is in preparation. On the other hand, given the very limited number of new cases the Supreme Court agrees to hear on a year-to-year basis, it would be naive to expect near term resolution by the Court of the Eighth and Tenth Circuits’ conflicting views regarding RCRA overfiling. Nevertheless, it will be quite beneficial to monitor future developments concerning this important issue.

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COMMITTEE ADOPTS PUBLIC SERVICE PROJECT

Christopher P. Davis

The Public Service Task Force coordinates the public service activities of all of the Section's committees. The Task Force has identified eight types of projects that it encourages Committees and their members to undertake as a means of "giving back" to our communities. At the meeting of the Superfund and Hazardous Waste Committee's vice chairs at the 10th Section Fall Meeting in Portland, Oregon, we decided to adopt and combine two of these recommended projects: Educational Instruction in Schools and Earth Day/Law Day projects. The concept is for each interested Committee member, on Earth Day or Law Day 2003 (and thereafter), to lead students in a local school in a participatory, role play exercise on a timely environmental legal topic. Suggested materials for several such role-play exercises are presented on the public service page of the Section's Web page. Examples that we have used successfully in the past are a "not in my backyard" (NIMBY) case involving the siting of a solid waste facility (ideal for high school and junior high students) and the *U.S. v. Bunyan* trial of Paul Bunyan for illegal logging (ideal for elementary school students). The latter has been presented in a local elementary school by Section members at each of the last two Section Fall Meetings.

These programs can be scheduled and coordinated either by individual lawyers directly contacting local schools, or as part of a larger program sponsored by a local bar association. One successful example of the latter has been the Boston Bar Association's annual "Law Day in the Schools" program, which includes an environmental law component, and has successfully used a similar NIMBY siting exercise for a number of years. Since the school programs require

advance scheduling and planning, Committee members are encouraged to start the planning process with local school administrators and teachers early in 2003. Planning and presenting one of these school programs (which can be done by one or several lawyers per classroom) require only a limited number of hours, and have great rewards both for the students and the lawyer. For further information or assistance in planning a Law Day or Earth Day in the schools program, contact Chris Davis (cdavis@goodwinprocter.com); 617/570-1354.

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TECHNOLOGY REPORT

Seth A. Davis

In addition to the list serve maintained by the ABA Section of Environment, Energy, and Resources, the Superfund and Hazardous Waste Committee has its own list serve. All committee members are encouraged to participate in the Committee list serve, and to use it to share recent developments in the hazardous waste and Superfund area, to post queries to the Committee membership, or for any other matters of general interest.

If you listed an e-mail address when you joined the Committee you are already a list serve member. You may post a message to all other members simply by sending it in e-mail to ENVIRON-SUPERFUNDHAZ@mail.abanet.org. If you need help in joining the list serve or have any trouble using it, please feel free to contact Seth Davis (sdavis@huberlaw.com).

The Committee also hopes to have a committee “Web board” set up soon. A Web board will allow us to have a slightly more structured bulletin-board type forum for substantive discussions.

Seth A. Davis (sdavis@huberlaw.com) is a member of Huber, Lawrence & Abell in New York, New York. He is the Technology vice-chair of the Superfund and Hazardous Waste Committee.

THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT: IMPLEMENTING CHANGES TO SUPERFUND LIABILITY

K.C. Schefski

After years of legislative deliberations on Superfund reform, the 107th Congress passed the most significant amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (2000), since the Superfund Amendments and Reauthorization Act of 1986. The Small Business Liability Relief and Brownfields Revitalization Act (the Act), Pub. L. No. 107-118, 115 Stat. 2356 (2002) (to be codified in scattered Sections of 42 U.S.C §§ 9601-9675), addresses many of the reforms sought, and largely achieved administratively, since the 103rd Congress. However, the Act is not the comprehensive Superfund reform sought by many in the Superfund community. Rather, the Act targets some of the most inequitable consequences of Superfund’s broad liability scheme, and changes that will encourage the responsible cleanup and re-use of contaminated properties. The result is an Act that received bipartisan support in Congress, the endorsement of the Bush administration, support from the states, and approvals from both sides of the fence in the Superfund

community.

The Act consists of two titles. Title I addresses liability exemptions for parties who generate and transport small quantities of hazardous substances and certain generators of municipal solid waste. Title I also provides for expedited settlements with certain parties that can demonstrate a limited or inability to pay their share of response costs. Title II amendments focus on facilitating the responsible cleanup and re-use of contaminated properties. The amendments provide specific statutory authority for the Environmental Protection Agency’s (EPA) brownfields program and authorize appropriations to fund brownfields grants and grants for state and tribal response programs. Title II also provides conditional exemptions from CERCLA liability for contiguous property owners and bona fide prospective purchasers and clarifies the pre-existing innocent landowner defense. Finally, the amendments place certain limits on EPA’s use of its enforcement and cost recovery authorities at low-risk sites where a person is conducting a response action in compliance with a state program.

The Liability Provisions of the New Law

De Micromis, MSW, and Ability to Pay

Section 102 of the amendments adopted with some modification three existing EPA policies in the areas of generators and transporters of de micromis amounts of hazardous substances, generators and transporters of municipal solid waste (MSW), and expedited settlements for certain parties with a limited ability to pay. Under new CERCLA Sections 107(o) and 107(p), certain de micromis and MSW generators and transporters are statutorily exempt from CERCLA generator and transporter liability, subject to several statutory exceptions. 42 U.S.C. § 9607. Congress also amended Section 122(g) to

codify for the benefit of certain parties EPA's practice of providing expedited ability to pay settlements. 42 U.S.C. § 9622.

Overall, the Act will likely not significantly change EPA's policies to the extent such policies are consistent with the Act. However, some provisions in the Act contain notable deviations from existing EPA policies. For example, while EPA policies addressing de micromis and MSW generators and transporters apply generally at all sites, the new statutory exemptions are limited solely to sites on the National Priorities List (NPL). EPA expects to issue guidance to explain these differences and how EPA policy might apply to similar parties not covered by the statute.

The Agency recently completely guidance for the MSW exemption. On Nov. 7, 2002, EPA's Office of Site Remediation Enforcement and the Department of Justice issued guidance entitled *Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties*. This policy explains that EPA will continue to consider on a site-specific basis settlements with, and contribution protection for, generators and transporters contributing de micromis amounts of hazardous substances that may not fall within the statutory exemption (e.g., at non-NPL sites).

Contiguous Property Owners, Bona Fide Prospective Purchasers, and Innocent Landowners

The amendments create two new conditional exemptions from CERCLA "owner/operator" liability for contiguous property owners and bona fide prospective purchasers (BFPP). Again, these exemptions embody aspects of pre-existing EPA policies. See *US EPA, Policy Towards Owners of Property Containing Contaminated Aquifers (1995)*; *US EPA, Guidance on Settlements with Prospective*

Purchasers of Contaminated Property (1995). The Act also modifies the existing innocent landowner defense by clarifying the meaning of "all appropriate inquiries."

One of the most notable aspects of these provisions is that all three conditional exemptions embody the following "common elements" for persons to maintain non-liable status:

- conduct "all appropriate inquiry" prior to purchase of the property;
- not be potentially liable or affiliated with any person potentially liable;
- exercise appropriate care by taking reasonable steps to "stop any continuing release; prevent any threatened future release; and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance;"
- provide full cooperation, assistance, and access to persons undertaking a response action or natural resource restoration;
- comply with all governmental information requests;
- comply with land use restrictions and not impede the performance of institutional controls; and
- provide all legally required notices regarding releases of hazardous substances

At time of publication, EPA is considering whether to produce general guidance on these "common elements." EPA has heard from stakeholders that they need clarification of these requirements to ensure they take appropriate actions to avoid liability. EPA

would like to ensure national consistency and provide direction where needed. However, requirements such as what constitutes appropriate care/reasonable steps will greatly depend on site specific circumstances.

Contiguous Property Owners

Section 221 of the Act adds new Section 107(q) which exempts from owner or operator liability persons that own land contaminated solely by a release from contiguous, or similarly situated property owned by someone else. In the case of a contiguous property owner, the owner must not have known or had reason to know of the contamination at the time of purchase and must not have caused or contributed to the contamination. The section also modifies what constitutes appropriate care/reasonable steps for contiguous property owners by clarifying that the requirement does not obligate a contiguous property owner to conduct groundwater investigations or remediate groundwater contamination except in accordance with EPA's pre-existing contaminated aquifer policy.

While much of the contiguous property owner provision would be covered in any guidance on the common elements, EPA is considering developing additional guidance on aspects of the provision that may differ from existing EPA policy. The Act generally provides greater protections for contiguous property owners than EPA's existing policy on owners of contaminated aquifers. The Act does not limit the exemption to properties contaminated by groundwater but may also apply to soil contamination resulting from neighboring properties. The Act also grants EPA the authority to provide assurances that the Agency will not take action against a person and protection from third party suits. As in EPA's Contaminated Aquifer Policy, a person who purchases with knowledge of the contamination cannot claim the exemption; however, the Act notes that a party who does

not qualify for the exemption for this reason may still qualify as a BFPP.

Bona Fide Prospective Purchasers

The most notable aspect of the BFPP provision is that for the first time Congress has limited the CERCLA liability of a party who purchases real property with knowledge of the contamination. The caveats to this exemption, in addition to the common elements, include a requirement that all disposal takes place prior to the date of purchase, that the person does not impede a response action, and that the property may be subject to a "windfall lien." The windfall lien provision provides for a lien on the property of a BFPP if EPA has unrecovered response costs and the response action increased the fair market value of the property. The lien arises as of the date the response cost was incurred and the amount cannot exceed the increase in fair market value attributed to the response action. EPA recognizes that the windfall lien provision has proven a point of discussion and confusion that will likely require some explanation from EPA as to how the provision will be applied.

EPA's policy on prospective purchaser agreements (PPAs) proven to be one of the most successful and high profile administrative liability reforms prior to enactment of the Act – prior to passage EPA had issued over 160 PPAs. Immediately after passage, EPA was asked repeatedly whether EPA would continue to issue PPAs. Many people commented that EPA needs to continue the practice, despite the fact that the Act provides an exemption and confronts an ongoing complaint, from some of these same people, that EPA should not be involved in private real estate transactions.

To address this issue, on May 31, 2002, EPA's Office of Site Remediation Enforcement issued new guidance entitled *Bona Fide Prospective Purchasers and the New*

Amendments to CERCLA. This guidance states that “EPA believes that, in most cases, the Brownfields Amendments make PPAs from the federal government unnecessary.” Therefore, in the majority of cases, EPA intends for the law to be self-implementing. However, the guidance does recognize the following two exceptions where EPA may enter into an agreement with the purchaser: 1) there is likely to be a significant windfall lien needing resolution; and 2) the transaction will provide significant public benefits and a PPA is needed to ensure the transaction will take place.

Innocent Landowners

Changes to CERCLA Section 101(35)(B) now define “all appropriate inquiries” for purposes of all three provisions. First, the Act directs EPA to promulgate regulations based on statutory criteria within two years of date of enactment, establishing standards for all appropriate inquiry. For purchases prior to issuance of these regulations, the Act utilizes two standards based on date of purchase. For purchases prior to May 31, 1997, the Act sets forth a narrative standard, directing courts to consider such factors as, inter alia, specialized knowledge of the defendant, the obviousness of the contamination, and relationship of purchase price to property value. For purchases after May 31, 1997, the Act states that procedures set forth in the American Society for Testing and Materials, Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process, Standard E1527-97 shall satisfy the requirement. The section also provides that for purchasers of property for residential use or similar use by a nongovernmental or noncommercial entity a facility inspection and title search shall fulfill the requirements.

The provisions defining all appropriate inquiry raise two implementation issues for EPA.

First, EPA must promulgate a regulation setting forth the standards which will satisfy this requirement. To this end, EPA has initiated the process for conducting a negotiated rulemaking under the Negotiated Rulemaking Act. 5 U.S.C. §§ 561-570 (2000). If EPA decides to follow this approach, it will allow EPA to work with a broad range of stakeholders to develop practices designed appropriately for their intended use. Also, the Phase 1 Environmental Site Assessment standard referenced in the new law was actually superceded with a new standard in 2000. The 1997 version is no longer available through ASTM. EPA expects to issue a Direct Final Rule pursuant to the Administrative Procedure Act to clarify that compliance with the 2000 standard will satisfy the all appropriate inquiry requirement.

Limitations on EPA CERCLA Enforcement and Cost Recovery Authorities

Section 231 of the Act amends CERCLA by adding a new Section 128. 42 U.S.C. § 9628. Section 128(b) sets forth limitations on EPA's enforcement authority under Section 106(a) and cost recovery authority under Section 107(a). These limitations apply to actions against persons who have conducted or are conducting response actions at “eligible response sites” in compliance with a “State program that specifically governs response actions for the protection of public health and the environment.” The limitations only apply at eligible response sites – a term now defined in CERCLA Section 101(41)(C). 42 U.S.C. § 9601(41)(C). Furthermore, the limitations only apply to response actions commenced after Feb. 15, 2001 and in states that maintain a public record of sites being addressed under a state program in the upcoming year and those addressed in the preceding year. Additionally, these limitations are subject to specified exceptions.

EPA has decided not to issue guidance at this

time on these new limits to EPA authority. EPA believes that Congress provided a fairly detailed statutory structure and that Section 128(b)(1) simply appears to embody EPA's current practice of generally not getting involved at sites being cleaned up under a state program. However, EPA has taken some steps to ensure proper implementation of this section. Some EPA regional personnel have communicated with their respective states regarding how they anticipate handling the notification requirements and state requests for assistance, if necessary. For example, EPA, Region 9 in San Francisco has developed model letters to facilitate this communication between EPA and the states. Additionally, a group is assessing the exclusion from the definition of eligible response site for sites which EPA has determined qualify for listing to see how this exclusion works with the current site assessment and scoring process.

EPA's Implementation Effort

The Act's substantial amendments to CERCLA liability and changes to the Agency's brownfields program have led EPA to initiate a considerable effort to implement the new legislation. EPA has taken a three pronged approach to this effort – developing work products to assist EPA and the public, outreach and communication, and securing an adequate budget.

Both EPA employees and the public need direction, clarification, and guidance on the variety of changes to CERCLA and existing EPA policies. Within EPA, the legislation impacts various programs and offices requiring each to communicate and play an active role in giving effect to the amendments. To implement Title II, EPA has organized a structure to insure cross program and EPA regional participation. A steering committee consisting of senior EPA management leads the effort by setting implementation priorities

and resolving significant policy issues. The work of directing implementation efforts falls to an inter-office task force made up of various office and division directors. Actual work products are developed by workgroups, which include representatives from different EPA offices, regions, and in some cases the Department of Justice. EPA has also reached out to a variety of affected stakeholders to seek input and concerns. First, EPA has held a series of listening sessions attended by stakeholders and representatives from different EPA offices. The list of invitees included state, tribal, and local governments; environmental justice, community, environmental, and land use organizations; private sector companies; and professional associations, such as the American Bar Association (for a more detailed list and meeting notes see <http://www.epa.gov/brownfields/sblbra.htm>). These sessions helped focus EPA on specific questions and issues that the public believes need to be addressed during implementation, and gave EPA the opportunity to convey its initial thoughts on the Act. Second, EPA has targeted certain state and tribal organizations for ongoing involvement in implementation work. In particular, the enforcement office has communicated with the National Association of Attorneys General, the Association of State and Territorial Solid Waste Managers Officials, and the American Bar Association. Many of the workgroups that are addressing provisions which will have significant impact on the states and tribes, such as the state and tribal funding provisions, hold conference calls with State and tribal representatives acting in their official capacities to give progress updates and seek input. Through these interactions EPA hopes to achieve implementation that is widely understood and accepted by its stakeholders.

Finally, the new brownfields and state and tribal funding programs would prove meaningless without adequate funding. The president's fiscal year 2003 budget requests

\$200 million for these purposes. If fully appropriated, this would more than double the funding received for fiscal year 2002.

Conclusion

EPA, including the enforcement office, has long recognized the benefits of putting remediated property back into productive use and the need to ensure equitable application of CERCLA's broad liability provisions. For nearly a decade, OSRE has embodied these goals in policy and guidance recognized by Congress in enactment of this new legislation. EPA will strive to give effect to the goals and purposes of the new law and do so with significant input from those most affected by these changes.

K.C. Schefski (schefski.kenneth@epamail.epa.gov) is an attorney-advisor in the Office of Site Remediation Enforcement of the EPA. These materials were part of a presentation by Paul Connor, Director, Policy and Program Evaluation Division, Office of Site Remediation Enforcement, EPA, at the 10th Section Fall Meeting in Portland, Oregon on Oct. 9-13, 2002.

ENVIRONMENTAL SCIENCES PROGRAM A SUCCESS

Christopher P. Davis

The Section's program "Environmental Sciences for the Technically Challenged" was held in Philadelphia on Nov. 7 -8, 2002, and drew 70 registrants from 22 states. This program, last held in 1999, was started in the early 1990's by a planning subcommittee of Superfund and Hazardous Waste Committee members, including Keith Hopson, Tina Woods, George Rusk and Christopher Davis. The day and a half program provided an overview of scientific and technical basics and

recent developments in environmental chemistry, hydrogeology, field sampling techniques, remediation technologies, air and water pollution control, toxicology and risk assessment. This program, which is a low-cost, high quality alternative to similar commercial programs, was a valuable educational service both to newer environmental practitioners and far more experienced practitioners. The faculty (several of whom have been with the program since its inception), are nationally known experts in their fields, and most have served as expert witnesses in prominent environmental cases. The 2002 Environmental Sciences program was sponsored by six of the consulting firms that provided speakers (i.e., Ecology and Environment, Inc., The Johnson Company, Keramida Environmental, Inc., Roux Associates, Inc., Trillium, Inc., and URS Corporation) and the law firm of Manko, Gold, Katcher & Fox LLP. The planning subcommittee hopes to continue to hold the Environmental Sciences program on an annual basis.

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LIKE TO WRITE?

If you would like to contribute to the Superfund and Hazardous Waste Committee Newsletter, please contact the Newsletter editors:

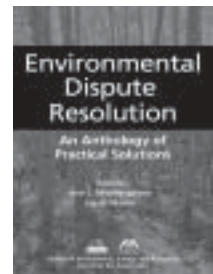
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New from ABA Publishing and The Section of Environment, Energy, and Resources

Environmental Dispute Resolution: An Anthology of Practical Solutions **Ann L. MacNaughton and Jay G. Martin, editors**

Environmental Dispute Resolution: An Anthology of Practical Solutions provides comprehensive and thoughtful treatment of the topic for the serious student and also highly practical guidance in specific substantive contexts to those who may wish to focus on one or a few of its chapters. This useful handbook provides a toolkit of diagnostics, systems, strategies, and methodologies proven effective in diverse substantive contexts. It can be read in order, or in any order, or chapters can stand alone for the reader with a particular substantive or procedural focus. The information in this book will be invaluable to anyone involved with environmental risk management, environmental management systems, environmental dispute resolution, or sustainable development system design and implementation.



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- Effective Settlement Strategies in Public Disputes
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FIFTH CIRCUIT REVERSES COURSE IN AVIALL

Thomas H. Milch
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On Nov. 14, 2002, sitting *en banc*, the Fifth Circuit Court of Appeals reversed the earlier rulings of a Texas federal district court and a divided three-judge appellate panel in *Aviall Services, Inc. v. Cooper Industries, Inc.*, 2002 WL 31521595. The Fifth Circuit's opinion reaffirms the right of private parties to seek recovery of contaminated property cleanup costs in federal court without previous federal government action at the site in question. The earlier rulings, *Aviall Services Inc. v. Cooper Industries, Inc.*, 2000 WL 31730 (N.D.Tex. Jan. 13, 2000), *affirmed* 263 F.3d 134 (5th Cir. 2001), had caused a substantial ruckus among Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) defendants who do proactive cleanups, because they threatened to limit substantially their contribution rights against more recalcitrant responsible parties. Here is some history and context for the most recent ruling.

As originally enacted, CERCLA allowed private parties to bring claims for the recovery of cleanup costs under Section 107, but it did not explicitly include a provision allowing responsible parties who paid more than their equitable share of cleanup liability to seek contribution from other responsible parties. Nevertheless, many courts implied such a right in the statute and allowed contribution claims. *See, e.g., City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D.Pa. 1982). As part of the Superfund Amendments and Reauthorization Act (SARA) amendments in 1986, Congress enacted the provision in Section 113 of CERCLA at issue in *Aviall* precisely to clarify the availability of a contribution claim under CERCLA. Section 113 grants federal courts broad equitable

powers to apportion costs among responsible parties in a contribution action, and those actions have become a regular feature of CERCLA litigation.

Although SARA clarified the right to contribution under CERCLA, it led to a simmering controversy by failing to differentiate clearly between those private parties entitled to bring a claim for cost recovery under Section 107 and those confined to a contribution claim under Section 113. The distinction is important, because Section 107 is broader in scope. Since it allows for joint and several liability, Section 107 permits a cleanup party to shift substantial costs, even those attributable to orphans or other parties not present in the case, to the defendant. Consequently, most private parties seeking CERCLA cost recovery brought claims under both sections, and courts were forced to decide who was entitled to maintain claims under each.

Over time, the vast majority of circuit courts resolved the Section 107 vs. Section 113 controversy by allowing claims for joint-and-several cost recovery under Section 107 only by parties who are not themselves responsible for contamination of the property. *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416 (2nd Cir. 1998). This approach limited most CERCLA plaintiffs to a Section 113 contribution action. Thus, a Section 113 contribution claim is often the only cost recovery claim available to parties who qualify as responsible parties under CERCLA, even parties whose equitable share of the cleanup liability is small.

Against this backdrop came the Fifth Circuit's now vacated panel decision in *Aviall*, which would have upset this scheme by placing a critical pre-condition on the maintenance of a CERCLA contribution claim. The original decision would have restricted contribution claims to only those private parties who were

themselves the subject of a prior or pending cost recovery claim under Sections 106 or 107 of CERCLA. Thus, parties who accepted responsibility for all or part of a cleanup without federal administrative or judicial compulsion would have been left without a federal statutory remedy to recover costs from other responsible parties. Notwithstanding that they were proactive about undertaking the cleanup, they would be “too liable” to bring a Section 107 claim but not quite liable enough to bring a CERCLA contribution claim. As the facts of the *Aviall* case demonstrate, this situation is not at all unusual, and the *en banc* reversal comes as a relief to many who feared the loss of a critical incentive for voluntary and cooperative cleanups.

The *Aviall* Facts

Aviall Services, the CERCLA contribution plaintiff, owned and operated an aircraft engine maintenance business in Texas throughout the 1980s. Aviall had purchased the business, including three separate maintenance facilities, from Cooper Industries in 1981. Both Aviall and Cooper used similar materials in their engine maintenance businesses, and each of the three facilities were found in the early 1990s to be contaminated by leaking underground storage tanks and surface spills.

During its ownership of the facilities, Aviall discovered some of this contamination and ultimately reported it to the Texas Natural Resource Conservation Commission (TNRCC). In response, the TNRCC compelled Aviall, through a series of letters threatening enforcement action and a Corrective Action Directive issued in 1993, to investigate groundwater contamination at the facilities and submit cleanup plans. As part of this process, Aviall entered one of the facilities in the Texas Voluntary Cleanup Program, a state-run program offering TNRCC oversight of voluntary cleanups as an alternative to

enforcement action. The United States Environmental Protection Agency (EPA) had no involvement in the cleanup, and Aviall was neither the recipient of a Section 106 order nor a defendant in a Section 107 cost recovery action. Aviall sold the facilities in 1995 and 1996, but retained the obligation to remedy environmental contamination existing before the sale.

In 1997, Aviall filed a complaint in federal court in Texas, seeking recovery from Cooper of costs associated with cleanup of the facilities purchased from Cooper in 1981. The complaint sought cost recovery under Section 107 of CERCLA, as well as several state-law tort and contract claims. Apparently recognizing the evolution of the Section 107 vs. Section 113 controversy, Aviall subsequently amended its complaint to drop the Section 107 claim, substitute a claim for contribution under Section 113 of CERCLA, and add a statutory contribution claim under the Texas Solid Waste Disposal Act. The district court dismissed the CERCLA contribution claim, finding that where a plaintiff cannot allege any prior or pending CERCLA enforcement action against it, it is precluded from seeking contribution in federal court pursuant to Section 113(f)(1) of CERCLA. With no remaining federal claims, the district court exercised its discretion to dismiss the state statutory and common law claims without prejudice.

The Original Fifth Circuit Panel Decision

On appeal to the Fifth Circuit, a divided panel affirmed the district court’s interpretation of Section 113. After reviewing the legislative history of SARA, which added the contribution provisions of Section 113 to CERCLA, the majority ruled that the language of the statute permitted contribution actions only “during or following” an action under Section 106 or 107. The portion of Section 113 at issue reads as follows:

Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], *during or following* any civil action under [§ 106] or under [§ 107(a)].... Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107(a)].” 42 U.S.C. § 9613(f)(1) (emphasis added).

Aviall argued that the savings clause found in the final sentence of Section 113(f)(1), providing that “nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106 or 107],” demonstrated that Congress had not intended such an interpretation. However, the majority reasoned that the addition of the contribution provision in the SARA amendments was intended only to clarify the right of parties subject to government or private cost recovery actions under CERCLA to seek contribution from other potentially responsible parties, and the savings clause was meant to confirm that parties not subject to such actions still could seek contribution under *state* law.

To the majority of the *Aviall* panel, this reading was clear from the plain language of CERCLA and its legislative history. After all, if the savings clause means that the existence of a civil action under Section 106 or Section 107 is irrelevant, then the words “during or following” would be rendered meaningless, a result that would in turn be inconsistent with the rules of statutory construction. Moreover, there is legislative history that can be read to support the majority’s opinion, although the language from Senate and House conference reports does not explicitly rule out a claim in *Aviall*’s circumstances. However, judicial decisions have long noted that the limited legislative history of CERCLA is far from clear.

See, e.g., *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988). Moreover, nowhere did the panel majority come to grips with another CERCLA principle frequently used to resolve legislative ambiguities: that the statute should be construed to ensure that responsible parties pay for contamination they caused. See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

Beyond the legislative history and language of the statute, the panel majority found support for its position in the prior holdings of two appellate decisions which suggested in *dicta* that a party cannot file a CERCLA contribution claim unless it is itself a defendant in a federal cost recovery or administrative action. See *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *OHM Remediation Serv. v. Evans Cooperage Co.*, 116 F.3d 1574 (5th Cir. 1997). Although *Rumpke* and *OHM* both indicate that the language of Section 113 requires that contribution actions can be brought only following a Section 106 or 107 action, neither case actually addresses the precise question presented in *Aviall*. Each decision allowed the Section 113 claim at issue to proceed, and the *OHM* court explicitly declined to express any opinion as to whether a party might bring a Section 113 claim before being sued under CERCLA.

Moreover, the panel majority reached its conclusion in the face of substantial contrary authority. There have been numerous appellate decisions permitting CERCLA contribution claims in the absence of a pending or completed civil action under Sections 106 or Section 107. See, e.g., *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998); *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997). Although no appellate court

had expressly considered the question presented in *Aviall*, CERCLA contribution actions brought in the wake of state cleanups have been a regular aspect of cost recovery litigation for many years.

In a well-articulated dissent, Judge Wiener took issue with the majority's interpretation of the legislative history of the savings clause. He stressed that if Congress so clearly intended to limit the savings clause to state contribution actions, it could have said so explicitly. He also correctly pointed to a number of other aspects of the ruling in which the majority, while nodding to strict statutory construction, engrafted its own policy judgments on the language itself. Most significant, the statute refers to Section 106 or Section 107 "civil actions," yet the majority ruled that a unilateral Section 106 order would be sufficient to trigger a Section 113 action. Of course, a Section 106 order is not itself a civil action, an entirely separate statutory cause of action that EPA largely abandoned after experiencing success with expansive use of its Section 106 order authority.

Judge Wiener also embraced the key policy argument in favor of a liberal approach to statutory construction here. He recognized the "overarching" policy need to encourage parties to do cleanups "without waiting for the hammer of litigation to drop." 263 F.3d at 155. The majority's opinion, he stressed, ran directly counter to CERCLA's goal of prompt cleanups and would encourage responsible parties to dodge remediation. Certainly the case law, and the experience of many practitioners, would support the view that a statutory mechanism for recovering from other liable parties encourages voluntary cleanups. See, e.g., *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *Adhesives Research, Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1246 (M.D. Pa. 1996).

Rehearing *En Banc*

The Fifth Circuit granted a rehearing *en banc* in December 2001, responding to a petition by *Aviall* that was supported by the American Petroleum Institute, the American Chemistry Council, and the Texas Oil and Gas Association as *amici curiae*. Following oral argument *en banc*, the Fifth Circuit took the highly unusual step of ordering the United States to file an *amicus* brief setting out the position of the Government on the issue. After what was reported to be protracted internal debate concerning both the substance of the Government's position and the constitutional propriety of the Fifth Circuit's order, the Department of Justice filed a 21-page brief supporting the reasoning of the original panel decision. The Justice Department brief relied primarily, as had the panel majority, on the language of Section 113, and concluded that the important CERCLA policy implications were irrelevant in the face of this language.

The position of the Justice Department was inconsistent with longstanding EPA practice of encouraging voluntary cleanups, and EPA reportedly had urged DOJ to support this position in its brief. Some have argued that the Justice Department position was driven by Bush administration appointees committed to principles of strict statutory construction.

The *En Banc* Decision

Whatever the source of the DOJ position, it was ultimately rejected by the majority of the Fifth Circuit in an opinion that largely adopts Judge Wiener's dissent. Most importantly, the court takes on the "plain meaning" issue forcefully. The *en banc* majority persuasively shows that there is nothing clearer about the panel's narrow interpretation of the statute than a broader interpretation of the same language. Essentially, in order for the panel's view to make sense, the word "only" has to be implied in the statutory language

notwithstanding the failure of Congress to use the word itself. Moreover, the decision of the panel to stretch the language further to sweep in Section 106 orders, even though issuance of an order manifestly does not constitute a civil action, reflects the contortions that the panel had to go through in order to fashion something workable out of a stricter interpretation.

The *en banc* majority also makes effective use of the long line of case law that supports a more expansive view of Section 113. The court correctly notes that there have been many previous contribution actions in which “talented attorneys” have had plenty of opportunity to make creative arguments of statutory construction, but nowhere in the history of these cases has the panel majority’s view made any headway. The *en banc* majority likens this history to “the dog that didn’t bark,” suggesting that if the panel’s reading was so “plain” and “clear,” some court would have accepted the argument earlier. Although reliance on the notion that no one previously accepted the argument smacks of bootstrapping, the reality is that the panel’s view of the statute did fly in the face of experience under the statute and hardly was compelling as a matter of statutory construction.

Finally, the *en banc* majority accepts the key policy arguments asserted by Judge Wiener, noting in particular the weakness of the argument that contribution plaintiffs should rely on state law. Noting that the argument requires a jump from the statute itself, the majority stresses with respect to state law actions that “[t]his is surely an inferior and questionable remedy for Congress to have embraced.” Indeed, the availability of state law remedies in these cases varies widely. Of forty-eight states with some statutory mechanism addressing contaminated site cleanups, at least one-half expressly provide a private right of action to recover cleanup costs

from other responsible parties. See 57 Am. Jur. Trials 1, § 40 (1996). However, contribution is not readily available in many states, as illustrated by a review of the three states briefly impacted by the Fifth Circuit’s original panel decision in *Aviall*. In Texas, where the *Aviall* case arose, the right to contribution provided under state statutes is fairly broad. See Tex. Health & Safety Code Ann. § 361.344 (Vernon 2001). The situation is not as favorable in the other two states in the Circuit. Louisiana has a more restrictive statute allowing certain parties to bring private cost recovery actions against parties who fail to respond to a state order, and Mississippi has no express statutory right of contribution for cleanup costs. See La. Rev. Stat. Art. 30:2205 (West 2000); Miss. Code Ann. 17-17-29(4). Whether a given state statute is a real alternative to CERCLA’s contribution remedy depends on the particular state law and the robustness of the case law under the statute in question. The bottom line is that in many states, the answer is far from clear, and CERCLA may offer the only real opportunity for responsible parties to bring a contribution claim for cleanup costs.

The two members of the original panel majority could rally only a single other member of the full court of appeals to join them in dissent, and they echoed the DOJ position that CERCLA policy implications were irrelevant in the face of clear statutory language. However, if there is one thing this protracted dispute has made evident, the language of this provision is anything but clear. In similar situations, courts have long resorted to CERCLA’s broad remedial goals as justification for expansive readings of the statute, and those policy goals certainly favor allowing parties who incur cleanup costs voluntarily to bring contribution claims.

Before the Fifth Circuit issued its *en banc* decision, the potentially broad impact of the original opinion was made clear. CERCLA

contribution defendants quickly seized on the case as precedent, and at least two district courts in the Fifth Circuit relied on the *Aviall* panel decision to dismiss Section 113 claims brought by parties who had not been the subject of a federal action to compel cleanup. See, e.g., *Chevron Env'tl. Mgmt. Co. v. Helena Chem. Co.*, No. 3:00CV110-D-D, 2001 WL 1530355 at *2 (N.D. Miss. Oct. 15, 2001) (plaintiff entered consent order with Mississippi Department of Environmental Quality); *Marathon Oil Co. v. Texas City Terminal Rwy. Co.*, 172 F.Supp.2d 897, 899 (S.D. Tex. 2001) (plaintiff failed to allege it had been subject to Section 106 or 107 action). In contrast, courts outside the Fifth Circuit disagreed, even with the benefit of the *Aviall* panel opinion, by rejecting the reasoning of that decision and continuing to allow contribution claims without prior federal action. See, e.g., *Aero-Motive Co. v. Becker*, No. 1:99-CV-384, 2001 WL 1699194 at *6 (W.D. Mich. Dec. 6, 2001).

The *en banc* decision of the Fifth Circuit in *Aviall* has laid this question to rest for the time being, and CERCLA contribution claims under Section 113 should again be allowed to proceed with their lawsuits following voluntary and state mandated cleanups. Although the statutory language is unclear, this result is the right one considering the full context of the statute, the history of Superfund litigation, and the policy rationale favoring voluntary cleanups.

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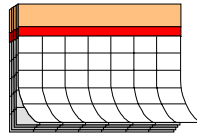
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