

March 16, 2005

The ABCs of Aviall & Potential Impacts on Brownfields & Voluntary Cleanup Programs

Moderated by: Barbara Coler, CA

This was an information sharing session which focused on the Supreme Court's December 13, 2004 decision in Cooper Industries, Inc. v. Aviall Services, Inc., 125 U.S. 577 (2004) (Aviall).

MAIN TOPICS:

1. Contribution rights for Potentially Responsible Parties (PRPs) under CERCLA Section 113(f)(3)(B)
2. Other means for PRPs to seek contribution were left undecided
3. First impression of the Office of Brownfields Cleanup and Redevelopment on Aviall's relevance to State Voluntary Cleanup Programs (VCPs)

Overview of the Case

Clarence Featherson of EPA's Office of Site Remediation Enforcement started by stating that the main goal of his presentation was to obtain input and solicit questions from the audience regarding Aviall. The Supreme Court Decision, reached on December 13, 2004, is still too new to really have a sense of what bearing it will have on voluntary cleanups and whether or not it will discourage participation in State VCPs. Mr. Featherson went on to state some of the legal issues that Aviall did and did not address. These include:

- The Supreme Court stated that the plain language of CERCLA allows PRPs to seek contribution only during or following a civil action under CERCLA Section 106 or 107, and that under Section 113(f)(3)(B), CERCLA provides contribution rights for a PRP that resolves its liability to the U.S. or a State in an administrative or judicially approved settlement.
- The Supreme Court did not decide whether a PRP has a cause of action against another PRP under CERCLA Section 107. The Court remanded the case to the U.S. Court of Appeals, 5th Circuit. Also, the Court did not decide whether a civil action includes a unilateral administrative order issued by EPA as opposed to a judicial action.

With respect to Brownfields sites, Mr. Featherson stated that parties who meet the Bonafide Prospective Purchaser, innocent land owner, adjacent land owner, etc., defenses should be able to recover costs under CERCLA Section 107.

Effects on State Voluntary Cleanup Programs

Sven-Erik Kaiser of EPA's Office of Brownfields Cleanup and Redevelopment stated his Office's position that Aviall should not have much of an affect on the use, or lack thereof, of State VCPs. Mr. Kaiser stated that not many volunteers go into a VCP program with the idea that they will sue for contribution under CERCLA Section 107.

QUESTIONS:

Q: Mr. Kaiser asked participants if any of the States had experienced outfall from the case with respect to their VCPs.

A: A representative from Oklahoma stated that a private attorney, practicing in his State, offered that he may no longer guide his clients toward conducting a voluntary cleanup as a result of Aviall.

Q: A representative from Georgia stated that the concern volunteers and affected parties in Georgia have expressed is how the Aviall decision will affect their liability with respect to CERCLA.

A: Mr. Featherson and Mr. Kaiser both stated that the Supreme Court's decision is limited to contribution actions under Sections 106, 107 and has no effect on CERCLA liability for sites that have completed cleanup under a State VCP.