

## SUPREME COURT AUTHORIZES PRPs TO RECOVER VOLUNTARY CLEAN-UP COSTS UNDER CERCLA

On June 11, 2007 the United States Supreme Court announced its much-awaited decision in the *United States v. Atlantic Research Corp.* case. In a rare unanimous opinion for an environmental decision, the Court held that potentially responsible parties (“PRPs”) who voluntarily clean up contaminated property may sue other PRPs to recover those costs under § 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”). The *Atlantic Research* decision answers the much contested question left open by the 2004 case *Cooper Industries Inc. v. Aviall Services, Inc.*—and broadens the opportunities for companies to recover some of the costs that they incur to voluntarily clean up contaminated property.

When CERCLA was first enacted in 1980 it did not include any statutory provision specifically addressing partitioning of costs of cleaning up properties which had been contaminated by multiple parties. Many courts found an implied right of contribution for PRPs who had undertaken voluntary cleanup action in the language of § 107(a)(4)(B) which states that any PRP is liable for “any other necessary costs of response incurred by any other person...”

With the enactment of the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), however, this settled perspective was called into question. In § 113(f), SARA grants private parties the right to seek contribution for costs incurred “during or following any civil action under [§ 106] of this title or under [§ 107] of this title.” While some courts continued to find that § 107(a) granted an implied right of contribution for PRPs who had voluntarily cleaned up property, other courts held that § 113(f) meant that contribution was *only* available to parties which had been subject to a federal civil action. Though the 2004 *Aviall* decision settled interpretation of the language of § 113(f), stating that only parties who had been sued under §§ 106 or 107 could seek contribution under that provision, it left open the issue of an implied right of cost recovery under § 107(a).

In the *Atlantic Research* case, Atlantic Research sued the United States under § 107(a) and § 113(f) for costs it incurred in cleaning up property it contaminated during the time Atlantic Research leased the property from United States Department of Defense. After the *Aviall* decision foreclosed Atlantic’s § 113(f) claim, Atlantic Research amended its complaint to seek relief solely under § 107(a) and federal common law. The Eighth



Circuit found that Atlantic Research could sue the United States as a PRP under § 107(a), holding that § 113(f) is not “the exclusive route by which [PRPs] may recover cleanup costs.”

Speaking for an undivided Court, Justice Thomas agreed with the Eighth Circuit’s holding. Reading the statute “as a whole,” Justice Thomas declared that the language of section § 107(a)(4)(B) obviously grants a cause of action for cost recovery to any party not listed in § 107(a)(4)(A)—the United States, a State, or an Indian Tribe. According to the Court “the plain language of subparagraph (B) [of § 107(a)(4)] authorizes cost-recovery actions by any private party, including PRPs.”

The Court also rejected the position of the government and several lower courts that recovery under § 107(a) is only available to so-called “innocent parties,” i.e., those parties who had not contributed to the contamination. Noting that the definition of PRP under CERCLA is so broad as to “sweep in virtually all persons likely to incur cleanup costs,” the court pointed out that this view of § 107(a) would render that portion of the statute “a dead letter.” The government’s proffered interpretation would virtually insulate the government – one of the nation’s largest polluters – against cost recovery or contribution actions. By not filing a § 113 action against any other PRPs at a site, the government could nullify any § 107 or § 113 claim against it by another PRP at that site.

In addition, Justice Thomas addressed the concern that allowing PRPs to seek cost recovery under §107(a) invites abuse because allows parties to circumvent the shorter statute of limitations in § 113. The two remedies are mutually exclusive, the Court held, and provide causes of action “to persons in different procedural circumstances.” A party may seek cost recovery under § 107(a) for the costs which *that party* has already incurred for the cleanup of the property. A party may seek contribution under § 113(f) for the money it has spent “to satisfy a settlement agreement or court judgment.” Since the money a party spends to satisfy a settlement or court judgment is not a cost that party has incurred *for cleanup*, recovery under § 107(a) is not available.

With its more expansive view of § 107(a), the *Atlantic Research* opinion broadens the available options for parties seeking to remediate contaminated property. Though many feared that the *Aviall* decision would discourage voluntary clean up of contaminated property, *Atlantic Research* makes clear that PRPs can be confident that CERCLA provides an avenue for recovery of voluntary clean up costs. Property owners or other PRPs do not need to wait for a federal civil action to be filed to clean up property and put it toward more economically valuable use; now any private party can seek recovery from other PRPs under § 107(a).

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