

Demetriou, Del Guercio, Springer & Francis, LLP

BROWNFIELDS UPDATE

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Demetriou, Del Guercio, Springer & Francis, LLP informs you of recent dramatic developments related to the cleanup and/or acquisition of "brownfields," i.e., properties at which future expansion, re-development, or reuse may be complicated by the potential presence of hazardous substances, pollutants, or contaminants.

First, on December 14, 2004, the United States Supreme Court held in *Cooper Industries, Inc. v. Aviall Services, Inc.*, Case No. 02-1192, 543 U.S. ____ (2004), ("*Cooper v. Aviall*"), that, in the absence of a CERCLA section 106 or 107 civil action or an administrative settlement, a potentially responsible party ("PRP") which voluntarily incurs response costs may not bring a contribution action under § 113(f)(1).

Second, California enacted Assembly Bill 389 (the California Land Reuse and Revitalization Act of 2004) which became effective on January 1, 2005. This State law adopts certain amendments made to the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and provides immunity from environmental liability for three categories of "brownfields" owners: 1) innocent landowners; 2) bona fide purchasers; and 3) contiguous property owners.

Finally, the California En-

vironmental Protection Agency ("Cal/EPA"), Department of Toxic Substances Control ("DTSC"), the State Water Resources Control Board ("SWRCB"), and Regional Water Quality Control Boards ("RWQCB") are involved in an intensive effort to develop a Memorandum of Agreement ("MOA") regarding the regulatory oversight of brownfield sites in California. The purpose of the MOA is to improve coordination between the DTSC, SWRCB, and RWQCB regarding the oversight of cleanup activities at brownfield sites.

As more fully discussed below, these recent developments are of special significance to current and prospective owners and operators of brownfields. Should you have any questions or require expert assistance regarding the effects of *Cooper v. Aviall*, AB 389, the proposed brownfield site MOA, or any other matter affecting the use and development of brownfields, please feel free to call Michael A. Francis or Brian D. Langa of this office.

Cooper v. Aviall Precludes Contribution Recovery for "Voluntary" Cleanups

Until recently, it was not uncommon for a party with an interest in a Brownfields to undertake the cleanup of the property and recover at least a portion of its response costs in a CERCLA contribution action

against other responsible parties. However, the surprising, recent Supreme Court decision of *Cooper v. Aviall* cautions that CERCLA contribution actions are not always available to parties that conduct such "voluntary" cleanups.

The case concerned four aircraft engine maintenance sites contaminated with petroleum and other hazardous substances. Aviall, the then owner of the site, discovered the contamination and notified the Texas Natural Resources Commission ("Commission") of the contamination. The Commission informed Aviall that it was violating state environmental laws, directed Aviall to clean up the site, and threatened to pursue an enforcement action if Aviall failed to undertake remediation. Aviall incurred more than \$5 million in cleaning up the properties under the State's supervision, and thus filed a CERCLA contribution claim against the prior owner and operator, Cooper, seeking contribution. The United States Supreme Court reversed an en banc opinion of the Fifth Circuit Court of Appeals and held that Aviall was not entitled to bring a CERCLA section 113 contribution claim.

Specifically, the Supreme Court held that a private party is not permitted to bring a cost recovery action under § 113(f)(1) of CERCLA unless the

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United States, the State, or a private party has first taken action against the party under sections 106 or 107 of CERCLA or the party has entered into an administrative settlement with the United States or State.

CERCLA section 113(f)(1) provides in relevant part that “Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . 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 9606 of this title or under section 9607 of this title.”

The Court held that “the natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely “during or following” a specified civil action. The Court rejected *Aviall*’s argument that “the term ‘may’ should be read permissively such that ‘during or following’ a civil action is one, but not the exclusive, instance in which a person may seek contribution.” The Court also refused to accept that the last sentence of § 113(f)(1), the “savings clause,” establishes a separate cause of action or expands when a contribution action may be brought.

The Supreme Court did note that in addition to section 113(f)(1) providing an avenue for contribution “during or following” a section 106 or section 107 civil action, section 113(f)(3)(B) provides an avenue for a contribution action after a person has resolved liability to the United States or a State in an administrative or judicially approved settlement. In all other instances, a party cannot assert a section 113 contribution claim.

Perhaps recognizing the unfairness of punishing a voluntary actor complying with the Commission’s directives, the Supreme Court separately held that *Aviall* may be able to recover its response costs under CERCLA section 107. (The Supreme Court ordered the Fifth Circuit to address this issue on remand, but in dissent, Justice Ginsburg, joined by Justice Stevens, stated that *Aviall* was entitled to assert a section 107 claim.) However, the implication from this separate portion of the opinion creates further confusion given the present uniform agreement among all circuits that a PRP cannot assert a section 107 action. The Supreme Court recognized its implied position contradicted numerous circuit court decisions, but it stated it would not consider the issue until it had been fully briefed.

Whether a PRP can assert a section 107 claim is but one of several questions left open by the decision. For example, it remains uncertain whether a party which voluntarily complies with a section 106 order can seek contribution under section 113(f)(1). Further, must the party asserting the section 113 claim be a party subject to the section 106 civil action, section 107 civil action, or administrative settlement? The plain wording of the statute does not seem to require such, only that the claim follows a civil action or settlement. (However, the statute of limitations runs from the date of judgment or date or administrative order, so it is probable that the section 113 plaintiff should also have been a party to the earlier civil action or settlement.)

One significant fact often overlooked is that the *Cooper v. Aviall* decision is inapplicable to those parties that do not fall within the scope of CERCLA PRPs. This is because, for example, a CERCLA

innocent owner or bona fide purchaser may voluntarily undertake cleanup and assert a cost recovery claim under CERCLA section 107. Indeed, this is often preferable because a section 107 claim entitles the plaintiff to obtain joint and several relief from a defendant rather than a limited contribution amount.

Nonetheless, *Cooper v. Aviall* has dramatically altered the conventional understanding of CERCLA contribution claims. Now, a party which voluntarily incurs response costs in the absence of a CERCLA “civil action” under section 106 or section 107 or an administrative settlement may not bring a contribution action under section 113(f)(1). Thus, all PRPs, including present owners or operators of contaminated sites that do not enjoy a CERCLA recognized defense, must carefully evaluate investigation and cleanup strategies in light of the limitations set forth by *Cooper v. Aviall*.

For example, as indicated above, a party asserting a section 113 claim should now also include a claim under section 107. Further, parties that have incurred cleanup costs should evaluate other Federal, State, and/or common law avenues of cost recovery. Similarly, a party that has not yet incurred cost recovery costs may consider obtaining injunctive relief under the Resource Conservation and Recovery Act. (It is also now settled that redevelopment agencies can obtain injunctive relief under the Polanco Act.) Additionally, if a party is involved with a contaminated site in which governmental oversight is involved, the party should carefully consider the ramifications of “voluntarily” complying with the governmental agencies directives in the absence of a section 106 and 107 civil action or an administrative settlement.

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Similarly, if a party is involved in a site in which governmental agencies are not involved, a party may consider encouraging government agency involvement in order to maintain a right to a CERCLA contribution claim.

AB 389 Removes Obstacles to the Development of Brownfields

The California Land Reuse and Revitalization Act of 2004 ("AB 389"), which became effective on January 1, 2005, provides a measure of security to owners, purchasers and developers of environmentally contaminated "brownfields" properties.

Recall that on January 11, 2002 President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act. Although this Act amended CERCLA to facilitate brownfields redevelopment, it could not remove similar obstacles found in California law. AB 389 attempts to address this concern. AB 389, in conjunction with federal law, promotes brownfields use and redevelopment by those owners not at fault for the contamination of their properties, potentially protecting these parties by removing perhaps their greatest financial obstacle: liability for environmental cleanup costs and damage claims.

In short, Assembly Bill 389 may provide immunity from liability for three categories of brownfields owners:

- 1) innocent landowners – those parties that purchased brownfields property unaware of underlying contamination.
- 2) bona fide purchasers – buyers of property which was contaminated entirely by the actions of other owners or parties prior to the bona fide purchasers' acquisition. Note: Assembly Bill

389 will only apply to property acquired on or after January 1, 2005 by bona fide purchasers.

- 3) contiguous property owners – owners of properties contaminated by releases from neighboring sites.

However, in order to qualify for immunity, owners must enter into an agreement with an applicable agency to establish their qualifications to be included in one of these three categories. Owners must first prove that they made "all appropriate inquiries" into the previous history and use of the property, by performing a Phase I Site Assessment according to ASTM standards.

Owners must also prove that they have exercised appropriate care with respect to release of hazardous materials on site, have cooperated with all existing response actions and land use controls, and have provided all notices and reports required by responsible state agencies.

If the agency determines that a response plan is necessary to place the property in a condition to allow its use without unreasonable risk, the brownfields' owner will be required to submit a response plan and conduct appropriate remedial action. All agency review and oversight costs must be reimbursed by the brownfields' owner. If, after performance of remedial and removal actions, some hazardous materials remain on site at levels not suitable for unrestricted use, the response plan must contain land use controls imposing conditions or restrictions on site use. Upon approval of the response plan, brownfields' owners will be able to submit site information, including cost estimates and site description, via a form to be developed by the California Environmental Protection Agency.

Once agency requirements are

satisfied, innocent landowners, bona fide purchasers or contiguous property owners will, with limited exceptions, be immune from liability for cleanup costs and damage claims on their brownfields. In addition, courts will be authorized to award attorneys' and experts' fees to qualifying owners in contribution or cost recovery actions.

Even after immunity is granted, a significant exception may occur if conditions on the property pose a present endangerment, and the agency is unable to compel or locate the responsible parties with sufficient resources to perform a response action. In such an event, the agency may look to the brownfields' owner to perform the required response action. In addition, the AB 389 immunity scheme does not affect, and is categorically separate from, that immunity which is granted to redevelopment agencies that have undertaken brownfields cleanup (and passed on to subsequent purchasers and developers of those properties) under the Polanco Redevelopment Act. Further, the grant immunity will not shield a brownfield owner against cleanup actions required of brownfield owners by redevelopment agencies under the Polanco Act.

Unless it is subsequently reauthorized, Assembly Bill 389 will remain in effect until January 1, 2010, although all immunity granted pursuant to Assembly Bill 389 will remain in effect after that date. This new legislation may offer brownfields' owners the opportunity for productive and creative use of contaminated properties.

Cal/EPA Issues Draft MOA Regarding the Regulatory Oversight of Brownfields

In the latter part of 2004, Cal/EPA issued and sought public comment on a draft intra-agency

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Memorandum of Agreement (“MOA”) that would establish a process for identifying a single lead agency for oversight of brownfield sites. Once enacted, the MOA should establish more certainty as to whether the DTSC or a local RWQCB will be primarily responsible for overseeing the investigation and cleanup of a brownfield site. The MOA is an attempt to avoid the duplication of efforts in the cleanup of brownfield sites by directing DTSC and the RWQCB’s to establish which entity will assume primary oversight responsibility at a given brownfield site. The MOA should also result in the elimination of inconsistencies between methods and standards used by DTSC and the RWQCB’s.

Under the MOA, only one agency should be selected as the oversight agency to oversee the investigation and cleanup of each brownfield site whenever possible. The MOA sets forth several factors for DTSC and the RWQCB’s to evaluate when determining which agency should be in charge of a given brownfield site. These include:

Is one agency expected to have a greater long-term involvement with the site due to the type of releases present and the media affected?

Does one agency have more technical expertise to oversee the case?

Does one agency have a more appropriate regulatory mechanism for achieving site cleanup?

Does one agency have previous involvement with the site or other

sites in the area that might be beneficial to the cleanup?

What is the current land use at the site (including the source property and other affected properties)? If it is a sensitive land use such as residences, schools, day care facilities, and hospitals and hospices, then DTSC may be the more appropriate oversight agency.

Does the site pose a threat to sensitive water resources or habitat? Examples include sites located in critical groundwater recharge zones, sites that threaten wetlands or other sensitive habitat. In these situations, an RWQCB may be the more appropriate oversight agency.

Additional factors may include whether the applicant or site has a historic relationship with one of the agencies, and whether the applicant has a preference for one agency over another.

Once the oversight agency is selected, it is required to confer with the “support” agency to ensure that all standards and requirements of the support agency will be adequately addressed by the oversight agency. Significantly, in recognition of the MOA’s goals and principles, the support agency agrees to not pursue independent regulatory action at a brownfield site overseen by an oversight agency selected under the terms of the MOA, unless the oversight agency fails or refuses to ensure the standards and requirements of the support agency are addressed. Thus, the MOA is intended to provide certainty to the cleanup process by ensuring that another state agency will not require additional action in the future. (Although this benefit is signifi-

cant, the meet and confer requirement could also result in delays and additional expense when compared to cleanup of a brownfield that historically involved the standards and oversight of a single agency.)

Finally, the MOA will not apply in several instances, including but not limited to: existing cleanup sites; sites in specific programs where a statute designates a lead or oversight agency or authorizes action by one or the other agency, but not both; where a lead or oversight agency has been designated through a process defined or provided in statute; or where a lead or oversight agency has been designated or specified as a result of statutory direction or separate agreement between DTSC, the State Board and the RWQCB’s.

Cal/EPA has received several public comments regarding the draft MOA. (The period for public comment on the draft MOA expired on November 25, 2004, but the text of the draft MOA remains available at <http://www.calepa.ca.gov/Brownfields/MOA/BFMOA.pdf>.) Cal/EPA staff are presently evaluating the public comments and anticipate providing a recommendation in response to the comments prior to February 1, 2005.

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