



THE ADMINISTRATIVE WATCH

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EPA Issues Interim Guidance to Address *Aviall* Ruling

As most of our readers know by now, late last year the United States Supreme Court upset more than twenty years of case law and common practice by holding that a responsible party under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) cannot bring an action for contribution under CERCLA § 113(f)(1) unless that party has been subject to a “civil action” under CERCLA §§ 106 or 107. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004). The Court also affirmed that a private party which has entered into an “administrative or judicially approved settlement” with the state or federal government may sue for contribution under CERCLA § 113(f)(3)(B). As a result of this decision, parties who have incurred investigation and remediation expenses “voluntarily” – even at the threat of legal action by the state or federal government – have in many cases struggled to find an alternative means to spread their response costs among other potentially responsible parties.

Unfortunately, the lower federal courts have responded with little guidance on how these parties should proceed in light of *Aviall*, but have instead issued a series of disparate opinions on: (1) what constitutes a “civil action” under §§ 106 or 107; (2) whether an administrative order on consent constitutes an “administrative settlement” for the purpose of CERCLA § 113(f)(3)(B); and (3) the ability of parties to proceed with a cause of action under CERCLA § 107 against other potentially responsible parties. For example, some district courts have concluded that an administrative order on consent constitutes an “administrative settlement” for purposes of CERCLA § 113(f)(3)(B), while other district courts have indicated that the specific language of the order is critical in determining whether the order can be used as a basis to support a CERCLA § 113(f)(3)(B) contribution action.

In addition to seeking guidance from the lower federal courts, potentially responsible parties have turned to the United States Environmental Protection Agency (the “EPA”) for clarification on the current language in EPA’s three Model Administrative Orders on Consent (the “Model AOCs”). These parties have expressed concern that the Model AOCs do not clearly state that a settling party has resolved liability for response costs or response actions addressed in the order and that, as a result, their right to seek contribution from other parties to the extent provided by CERCLA § 113(f)(3)(B) is unclear. In response, the EPA and the United States Department of Justice (“DOJ”) issued interim guidance on August 3rd which provides

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line-by-line language changes for each of the Model AOCs. This interim guidance, *Interim Revisions to CERCLA Removal RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Arising Under Section 113(f)* (the “Interim Guidance”), makes clear that the position and intent of EPA and DOJ “has been, and continues to be, that EPA’s AOCs resolve a settling potentially responsible party’s liability within the meaning of CERCLA § 113(f)(3)(B).” In an effort to clarify this intent, the Interim Guidance indicates that EPA will, among other things:

- Change the name of the Model AOCs from “Administrative Order on Consent” to “Administrative Settlement Agreement and Order on Consent” and use “Settlement Agreement” as the shorthand internal reference; and
- Change the title of the “Contribution Protection” section to “Contribution” and add a statement that the Settlement Agreement resolves the Respondents’ liability for purposes of CERCLA § 113(f)(3)(B) for the work performed and past and/or future costs (as applicable).

Parties who are involved in or contemplating an environmental cleanup should carefully review the *Aviall* decision and EPA’s Interim Guidance prior to entering into any “administrative or judicially approved settlement” (such as an AOC). If you have any questions regarding the *Aviall* decision, the effects of EPA’s Interim Guidance or on how to best proceed with respect to negotiating an “administrative or judicially approved settlement” in light of *Aviall*, please contact Lindsay P. Howard at 412-394-5444 or lhoward@bccz.com, Kenneth K. Kilbert at 412-394-5433 or kkilbert@bccz.com, or Brandon D. Coneby at 412-394-6965 or bconbey@bccz.com.