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New Ninth Circuit Decision Confirms that Parties Who Undertake Soil and Groundwater Cleanups Voluntarily or at the Request of State Agencies May Seek Recovery of Costs Via Superfund Lawsuits

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A new decision by the U.S. Court of Appeals for the Ninth Circuit holds that parties who undertake environmental investigations and cleanups absent a U.S. Environmental Protection Agency (EPA) or court decree or judgment compelling them to do so may recover costs from other potentially responsible parties (PRPs) under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), better known as the federal "Superfund" statute.

Responding to the U.S. Supreme Court's recent decision in *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007), on April 17, 2008, the Ninth Circuit confirmed that parties who incur CERCLA response costs—where the EPA has not issued them a section 106 order or where they have not been sued and have response costs imposed on them via a CERCLA consent decree or judgment—can nonetheless properly seek cost recovery under section 107(a) of the statute. *Kotrous v. Goss-Jewett Co.* No. 06-15162 (9th Cir. Apr. 17, 2008).

Since CERCLA's passage in 1980, it has been clear that section 107(a) establishes that PRPs may be held liable for qualifying responses costs. Innocent parties and governments have successfully sued to impose joint and several liability under section 107(a) to recover costs incurred in the investigation and remediation (including monitoring) of sites at which hazardous substances had previously been released and polluted soils or groundwater. From 1980 to 1986, however, different judicial opinions emerged about whether or not non-innocent PRPs could use section 107(a) to seek contribution from other PRPs. In 1986, Congress addressed the issue by amending the statute to include section 113. CERCLA section 113(f) specifically provides that a PRP "may seek contribution from any other person who is liable or potentially liable."

To the surprise of many, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the U.S. Supreme Court held that CERCLA section 113(f)'s express right of contribution waslimited to use by PRPs who had incurred cleanup costs as the result of government enforcement orders issued pursuant to section 106 or lawsuits filed under section 107(a). In the wake of that decision, district and circuit courts around the country began to revisit pre-1986 case law concerning the extent to which section 107(a) impliedlyallows private parties to obtain contribution where, as is true in the vast majority of sites, the EPA has not chosen to issue a section 106 cleanup order or a section 107(a) claim has been successfully adjudicated via a consent decree or judgment.

In 2007, in *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, the U.S. Supreme Court weighed into this discussion and examined one of the issues left open by *Cooper*: whether CERCLA section 107(a) provides a PRP with a cause of action for recovery from other PRPs. The Supreme Court determined that it does, but only where the PRP bringing the 107(a) claim actually incurred the cleanup costs itself (as opposed to providing a settlement payment to another party that had incurred such costs).

In the wake of *Cooper Industries* and *Atlantic Research*, the Ninth Circuit recently examined possible causes of action for landowners who incurred cleanup costs in the absence of an EPA 106 order or judicially entered consent decree or judgment. In *Kotrous v. Goss-Jewett Co.*, a landowner who had *voluntarily* performed site characterization and investigation filed suit against (a) the owners of a dry cleaning operation on his land and

(b) the company that supplied PCE (perchloroethylene) to the dry cleaner. In a companion case, *Adobe Lumber, Inc. v. Hellman*, the owner of a shopping center (Adobe) investigated the site of a former dry cleaning operation at the center and worked cooperatively with the Regional Water Quality Control Board to create a work plan for the site (with no involvement by the EPA and without being forced to via litigation).

The plaintiffs in both of these cases filed suit against the owners of the dry cleaning operations and other PRPs under both section 107(a) and section 113(f) of CERCLA. The Ninth Circuit confirmed that section 107(a) permits recovery of cleanup costs in these situations—including where a party pays for investigative or cleanup costs either voluntarily or because of a state order (for example from the Water Board).

The court also stated that a party may *not* bring a section 107(a) recovery suit where it incurred costs pursuant to a section 106 order or a section 107(a) lawsuit. Instead, in those situations, the party must seek contribution under section 113(f). The difference may be significant because under section 107(a) there is the potential (in certain circumstances such as when an innocent purchaser or person qualifying for a bona fide prospective purchaser defense is asserting the claim) to impose joint and several liability on a PRP for the *entirety* of response costs incurred; in contrast, section 113(f) only allows the imposition of liability for an *equitable share* of the response costs incurred.

This opinion, in short, opens the court doors to parties who have incurred CERCLA response costs absent being forced to by the EPA or a court. *Kotrous v. Goss-Jewett* confirms that parties who have voluntarily incurred cleanup costs, or done so by means of taking a cooperative approach with state and local regulators, will be able to bring suit under CERCLA regarding recovery of some or all of those costs.

Morrison & Foerster has counseled and represented companies and landowners in soil and groundwater contamination matters and Superfund litigation throughout the United States for more than two decades. For further assistance with such matters or questions concerning the current state of the law governing CERCLA recoveries, contact Michèle Corash, Robert Falk, or Brooks Beard in our San Francisco office (**415-268-7000**) or Peter Hsiao in our Los Angeles office (**213-892-5200**).